

United States
Circuit Court of Appeals

For the Ninth Circuit.

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PAYNE FURNACE & SUPPLY COMPANY,
INC., a corporation,

Appellant,

vs.

WILLIAMS-WALLACE COMPANY,
a corporation,

Appellee.

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Transcript of Record

In Three Volumes

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VOLUME II

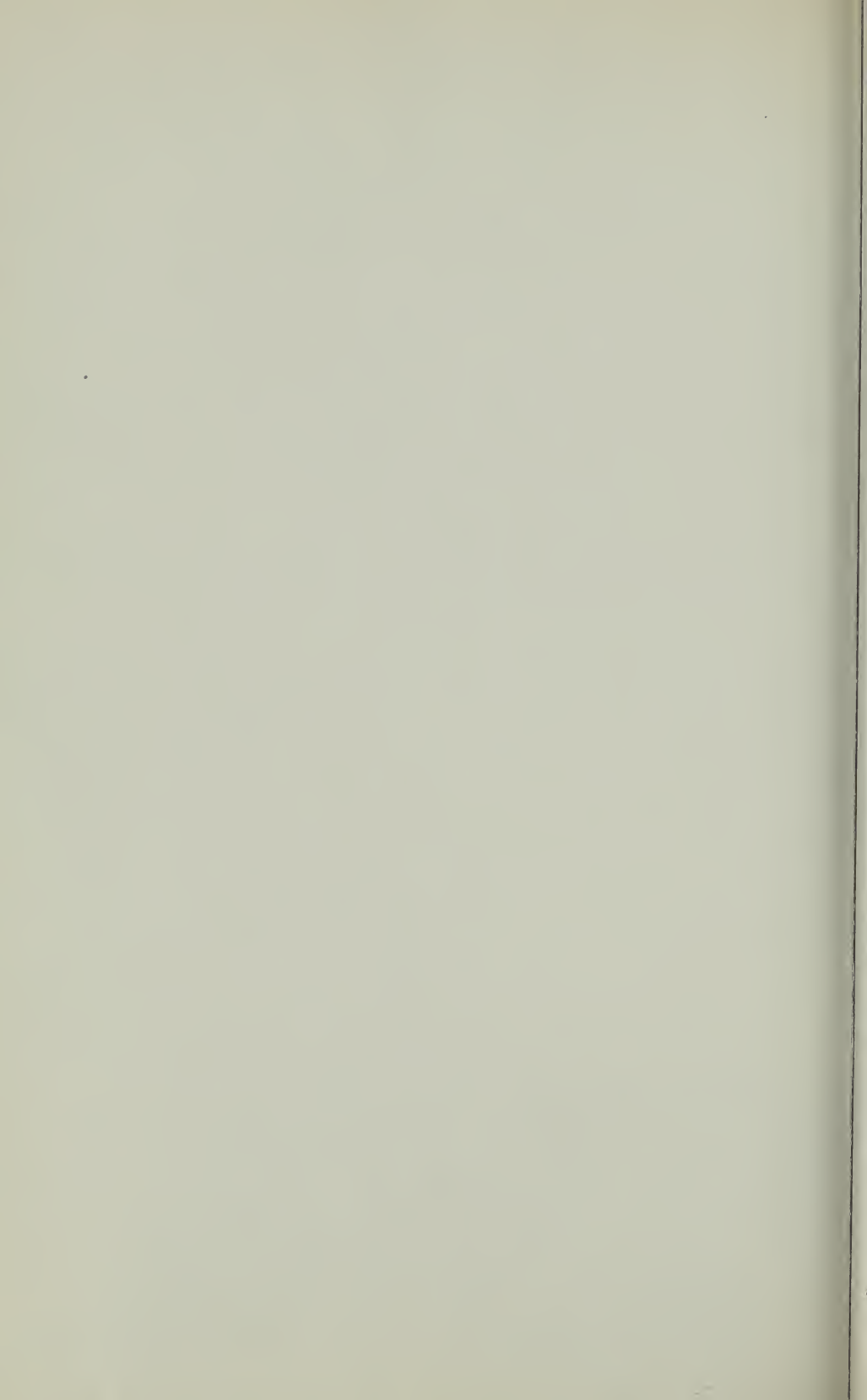
Pages 259 to 634

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Upon Appeal from the District Court of the United
States for the Northern District of
California, Southern Division.

FILED

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Upon Appeal from the District Court of the United
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THE HISTORY OF THE

REVOLUTION OF 1848

IN THE

REPUBLIC OF ITALY

BY

W. G. L. GARDNER

THE HISTORY OF THE REVOLUTION OF 1848 IN THE REPUBLIC OF ITALY, BY W. G. L. GARDNER. THE HISTORY OF THE REVOLUTION OF 1848 IN THE REPUBLIC OF ITALY, BY W. G. L. GARDNER.

EL ROY L. PAYNE,

Called for the Defendant; Sworn.

Mr. Connor: Q. What is your address?

A. Beverly Hills, California, 114 North Weath-
erly Drive; that is my residence address.

Q. And your business address?

A. 338 North Foothill Road, Beverly Hills.

Q. What is your business?

A. I am Vice President and General Manager
of the Payne Furnace & Supply Co., Inc.

Q. How long have you been in that business with
the Payne Furnace & Supply Co.?

A. The Payne Furnace & Supply Company and
its predecessor, which was originally D. W. Payne &
Son, have been in existence practically 23 years.

Q. Where was it first in business, that is, D. W.
Payne & Son?

A. 328 Second Street, Los Angeles.

Q. What was the nature of that business?

A. Sheet metal and furnace business.

Q. Who were the members of that firm?

A. My father and myself.

Q. What was the nature of that business?

A. Sheet metal and heating business, manufac-
turing gas furnaces and doing all kinds of sheet
metal work.

Q. Both you and your father were actively en-
gaged in that business? A. Yes.

Q. About what was the magnitude of the busi-
ness at that time?

(Testimony of El Roy L. Payne.)

A. Well, when we first started there was just my father and myself.

Q. How large a business did you have?

A. Well, we each put in \$250.

Q. And each worked in the business?

A. Yes.

Q. What is the nature of the business of the Payne Furnace & Supply Company now?

A. Well, to-day we have eliminated all [204] general sheet metal work, as we term it, that is, building work, etc., and concentrated entirely on the manufacture of furnaces and its component parts, such as pipes and fittings, and the contracting for installation of the same.

Q. That is all kinds of furnaces and heating equipment, you mean, and all appurtenances and equipment that go with it?

A. No, we concentrate entirely in gas-heating equipment in our manufacture.

Q. By "gas heating equipment" you mean what?

A. Well, gas floor furnaces and basement furnaces, and forced air heating, and then we make a room heater which we term a console heater, and then we manufacture these larger industrial furnaces that they use in commercial heating, which we sell to such firms as the Carrier Air Conditioning Company, York Ice Machine Company, General Electric, and Chrysler Airtemp.

(Testimony of El Roy L. Payne.)

Q. What was the magnitude of the present business during the past year, just generally how large, what volume of business did you do?

A. Last year, our year terminated March 3, that is, our fiscal year, and we did a little over \$1,260,000 from March, 1936 to March, 1937.

Q. About what would be the magnitude of the yearly business when your father and yourself started D. W. Payne & Son?

A. I would have to estimate it. I would estimate probably \$10,000 at the maximum.

Q. A year? A. Yes.

The Court: You mean \$10,000 net or gross?

A. Gross sales.

Mr. Connor: Q. Are you referring now to gross sales? A. Yes.

Q. What part of the United States, and you might say of the world, do you cover in your sales?

A. We cover the entire United States; when I say the entire United States, we have warehouse stock in Boston, Massachusetts, Atlanta, Georgia, Houston, Texas, [205] Dallas, Texas, Kansas City, Denver, Colorado, San Francisco. Of course, our main factory is at Los Angeles. We also have branches at Pasadena, Santa Ana and Long Beach. We also do considerable foreign business in the way of shipments to Australia and New Zealand and some to China.

(Testimony of El Roy L. Payne.)

Q. Those are points from which you distribute to merchants and various retailers?

A. Most of it is, of course, to utility companies, and then the heating contractors.

Q. Now, regarding your own personal experience in the field of heating and ventilating and so on, what has been your personal experience aside from being, as you might say, the directing head of the company?

A. I started in business, of course, quite young, and being that my father had been in the business practically all his life, when I was about 12 years old I assisted him in putting asbestos paper on warm water pipes. You might say that is the only business I was doing.

Q. You know the heating, and ventilating, and plumbing business pretty thoroughly, do you?

A. I would consider so, having been in it that long.

Q. What equipment do you manufacture and sell in connection with vent pipes of the nature such as under discussion here?

A. Appliances for all furnaces, you might term them, without exception have vent pipes; they must have a vent on them with just one exception, and that is a small pedestal heater, as we call it.

Q. That is one of these little movable heaters?

A. It is termed a portable heater.

(Testimony of El Roy L. Payne.)

Q. During the years of building up this business what various types of vent pipes have you encountered and have you installed at various places, taking from the start on down to say the present type under discussion?

A. When we first started in business, [206] and even prior to that time, when I worked for Mr. A. J. Hartfield, we made up our own vent pipes, made up with an inner pipe of galvanized iron in which there was a space by means of taking strips of metal we would run through the corrugated rolls on the roller, I should say the gears on the rollers, corrugate these strips and they would be attached to the galvanized inner pipe and then the outer pipe would be placed down over these and then the outer pipe was wrapped with three layers of eight-pound asbestos paper.

Q. About when were installations of that type made?

A. Well, from when I first went to work for A. J. Hartfield, which would be about 27 or 28 years ago, probably for a period of time of ten or twelve years, they used that type of vent. The next vent that came on the market was a vent called a cement pipe made up like concrete, in which they used special forms, the cement was poured into that, and then we used ordinary vitreous sewer pipe, clay pipe they called it, and then later that used the regular terra cotta pipe. Then after that they had this

(Testimony of El Roy L. Payne.)

Vitex, which was made, I think, by Mr. Stadtfeld, and then later by the Plant Rubber Company.

Q. This cement pipe and the vitreous sewer pipe, was that the main vent or the inside vent, or was that the outside vent, or what? Was it just used by itself alone, just as a single flue?

A. Well, when it was put in what we call a concealed wall it was used by itself; when it was installed on the outside of the building we used to build a case around it.

Q. That is an outer tube, you mean?

A. Well, sometimes on a round pipe we would use an outer tube, but if it was a rectangular shape of pipe we would just build a sheet metal housing around it to protect it from the weather. [207]

Q. Spaced from the inner pipe? A. Yes.

Q. I will show you Defendant's Exhibit G attached to the deposition of Mr. Baker and ask you if that is the type or kind of pipe that you have referred to as having been installed while you were in the employ of Mr. Hartfield?

A. Yes, that is along the lines described. I would like to say that is what is referred to as the metal we ran through the gears on the standard sheet metal rolls and made these hubs that way and we just soldered these here and slipped them down the other.

Mr. Owen: Might I have the record show that the witness indicated that corrugated ring is soldered to the inner tube: is that correct?

(Testimony of El Roy L. Payne.)

A. I did not say that. I said we used to solder it on. I do not believe I said that this one was.

Mr. Connor: Q. Did you ever solder the space, the corrugated ring in the space to both pipes, or just to one?

A. At times we did when there was just a short piece that would just extend through the ceiling of a one-story house, and there were no additional pieces to go onto it, we would solder them or attach them to keep the inner pipe from sliding off. That would be the only time.

Q. That would be after the pipe was made up, after the inner pipe had been slid into the outer pipe, that you would solder it?

A. Yes, we would attach it so that the inner one would not fall down.

The Court: What is this exhibit?

Mr. Connor: This is Defendant's Exhibit G, which is part of the Baker Deposition.

The Court: The depositions are Defendant's Exhibit 1.

Mr. Connor: This length of pipe is Exhibit G, part of the depositions. [208]

The Court: It is an exhibit of the deposition?

Mr. Connor: Yes, of the deposition.

The Court: I do not like to have something displayed that the record does not show exactly what it is. It is easy enough to follow it now, but it is not so easy to follow it in the record.

(Testimony of El Roy L. Payne.)

Mr. Connor: Q. Up to that time, to your knowledge, have vent pipes like the vent pipe of Defendant's Exhibit 1 been installed and used?

A. I don't quite understand your question.

Q. I will reframe it, it is not very clear.

A. You mean how long was this type of pipe used?

Mr. Connor: You testified when you were in the employ of Mr. Hartfield—I have forgotten what year now——

A. I said about 27 or 28 years ago.

Q. You made up and installed vent pipe of the type of Exhibit G attached to the depositions, Defendant's Exhibit 1. Now, during what period of time have you, or others, to your knowledge, continued to use that kind of vent pipe and installed it?

A. We used that type for many years, Mr. Connor. I don't know just when we discontinued using it. It was the time these other pipes came on the market and we gradually stopped using those in favor of the other types.

Q. Have you any knowledge of any ordinances being passed in the City of Los Angeles which affected in any way the use of this type of vent pipe?

A. Well, at the time I worked for Mr. Hartfield, and with my father, when we first started in business, this type of pipe was stipulated in the ordinances, the construction of it, and just when that was deleted from the ordinance I do not recall.

(Testimony of El Roy L. Payne.)

I know it was several years after my father and I started in business. [209]

Q. But it was specified in a city ordinance and installed under that ordinance for several years?

A. Oh, yes.

Q. Do you know anything about any modification, I mean of your own knowledge, or any changes that have been made in the ordinance relative to that type of vent pipe?

A. I do know, Mr. Connor, that one reason that this pipe was deleted from the ordinance, if that is what you refer to, was the fact that the inner pipe was galvanized iron, which was attacked by acid, product of combustion from the furnace, and which would cause it to flake and rust off and drop down into the bottom of the vent. Most of the vents were placed in concealed walls with just an opening at the bottom, and in case of water heaters, gas radiators, etc., all openings would just come out through the wall, quite similar to the demonstration we have there, and the inner pipe would scale off and rust out and fall down and clog the vent, and make a hazardous condition in that type of vent.

Q. What different types of vents, and when, have been installed by your company in recent years, we will say in the past ten years?

A. Well, in the last ten years we have used cement pipes and we have used considerable terra cotta.

(Testimony of El Roy L. Payne.)

Q. Will you explain how the cement pipes and terra cotta pipes were made up that you are referring to?

A. Well, most of the cement pipes, in fact I think I could say all cement pipes were of rectangular shape, with a separate dovetail joint here so as to divert the condensate to the inside, the inner pipe, I should say the pipe going on top, would have a layer extending down inside of the lower pipe, built up, and you would just put a layer of pipe around there and set them one on top of the other up to the roof.

Q. So that the inside would drain downwardly over the joint? [210]

A. Yes, it was a sort of dovetail or O.D. joint; in other words, it had the form of O.D. at the base of it. The terra cotta pipes were mostly round that we used, and had hubs on them, I believe you call them. Of course, they would set one right into the other.

Q. In other words, it was just like the ordinary sewer pipe? A. Yes.

Q. Vitreous sewer pipe?

A. We did use some vitreous sewer pipe, but vitreous sewer pipe in some of the larger applications was bound to check and crack. Terra cotta is baked under higher temperature or through some method of manufacture it withstands higher temperatures, and in time they ruled out the vitreous

(Testimony of El Roy L. Payne.)

sewer pipe and would not permit anything but the terra cotta.

Q. Were there any other types of pipes of more recent years?

A. Then we started using Vitex when it came on the market, and we used carloads of it.

Q. Will you describe what Vitex is, and who it was made by?

A. Vitex is a pipe made by the Plant Rubber & Asbestos Company.

Q. In San Francisco?

A. In San Francisco, and was made up with laminations, I guess you would term it, of asbestos paper, in which they used a glue, a sodium silicate or some chemical or ingredient, to seal these various layers of asbestos together. This made up a pipe with the thickness of the wall of about a quarter inch. They then built hubs around it quite on the same idea as a sewer pipe, so that in building them up the pipe could be fastened together properly, in other words to hold them firm. They used them for a great many years, until we started to manufacture Metalbestos. Occasionally during that time we used a little transite pipe, that is a pipe made by the Johns Manville Company, and that in some way resembled Vitex, only it is made [211] up, I believe, of about 75 or 80 per cent. of asbestos. It is a molded pipe rather than a rolled pipe.

(Testimony of El Roy L. Payne.)

Q. In reference to the so-called Metalbestos pipe, what vent pipes are being installed at the present time in addition to those vent pipes?

A. They are still using a great deal of Johns Manville Transite, and still using a considerable amount of cement and terra cotta.

Q. From your experience, what would you say the proportions might be—is there more of one sold than the other, just of your own knowledge?

A. Well, I would be unable to say, Mr. Connor, what the proportion would be, but I believe that right in Southern California, where I am mostly familiar with the retail business, there is probably 80 per cent. of other pipes used in proportion to 20 per cent. of Metalbestos, or our own pipes which we now call Payne-A-Vent.

Q. What do you call the pipe your company makes, the type your company makes that is charged to infringe the patent in suit?

A. We call it Payne-A-Vent.

Q. That is the pipe that has been introduced in evidence as Plaintiff's Exhibit 3? A. Yes.

Q. What does that capital "A" mean?

A. That designates the underwriters' approval, the listing, I think they call it, underwriters' listing.

Q. By the way, respecting these products that you manufacture, do all of these various things generally have to be approved?

(Testimony of El Roy L. Payne.)

A. All your furnace gas appliances now have to be approved by the American Gas Association. I state "have to be." That does not hold true in all localities, but most large cities and all utility companies demand the A.G.A. test and approval before they will sell them, and in many cases they have ordinances demanding that. [212]

Q. Do you manufacture and sell many products which are not approved by the American Gas Association? A. No.

Q. Is that a rule of your company, that you will not? A. That is correct.

Q. What does the round stamp with "U.L." on it mean?

A. That is the Underwriters' Listing.

Q. That indicates a successful test of it having been made by the Underwriters' Laboratory?

A. Yes.

Q. That stamp means that it has been approved?

A. Well, that it has met their test and requirements, I believe is the way they term it.

Q. Now, in the correspondence which has been introduced in evidence, particularly Mr. Stadtfeld's letters, there are different vent pipes referred to, I believe the Vitex, and I believe the Johns-Manville pipe—what is it called? A. Transite.

Q. The Vitex pipe, you say, is made by the Plant Rubber Company, I believe, in San Francisco? A. It was made by them.

(Testimony of El Roy L. Payne.)

Q. They do not make it any more? A. No.

Q. Will you describe what kind of a pipe that was, or how it was made up?

A. It is made up of laminations of plain asbestos paper. I think they use what we term 8 or 10-pound paper, and they build up a thickness quite similar to the layers put on there. I have actually seen them make it, and they have just one large roll of paper, and it draws off into a vat, into a solution that has a solution of sodium silica in it, and I believe cement and other stuff, then it is drawn over a mandrel and it keeps turning around until it builds up to the required thickness of a quarter of an inch. Then it is removed from the mandrel and put through a baking oven, and they used different coatings on it at times, experimented with various things to keep the condensate from penetrating [213] through the asbestos and causing on the outside what we term a baloon or a blister.

Q. That vent pipe is supposed to withstand the acid resulting from combustion and the condensate formed on the inside of the pipe, and also waterproofing on the outside by reason of this material?

A. That was the intention, yes.

Q. Sodium silicate hardens to a more or less brittle state, does it not, cementing these sheets together in a tube? A. Yes.

Q. Mr. Owen, in his opening statement, referred to the drawing here before the Court, and stated

(Testimony of El Roy L. Payne.)

that in a vent pipe of this type there is danger of cold air blowing down through the top of the vent pipe down to a hot water heater or furnace and blowing out the flame, and therefore a vent pipe which did not maintain a comparatively high temperature throughout its length was dangerous. Have you ever known of cold air being blown down through a vent pipe and blowing out the flame in an appliance such as a water heater?

A. That would have occurred years ago, but not on modern appliances.

Q. When you say "years ago", about how many years ago?

A. Well, prior to the American Gas Association laboratory tests, in which it was ruled that appliances were improperly designed and were not approved which did not provide diverters as a part of the appliance to divert any down pressure.

Q. About when were those rules adopted, how many years ago?

A. Well, I am a member of the Central House Heating Committee, that is one of their sub-committees of the A.G.A.—I have been a member ever since that sub-committee was originated, and that was in 1928, practically ten years ago. Of course, I am quite familiar with the research work that is done by the laboratory, and they conduct tests on diverters and have designed diverters so they will withstand normal down draft conditions from an

(Testimony of El Roy L. Payne.)

average [214] wind, as I recall it, they tried to set it by means of a blower, a down draft equal to a 50-mile wind blowing against an ordinary roof cap or vent cap, and at the same time when that occurred they took a sample of the flue gases, and you must have a good combustion even with a down draft occurring, so that you could not have over 1 per cent. of carbon monoxide. It would be impossible to approve an appliance that has a down draft if you did find any effect on it from any wind blowing down or any cold draft blowing down.

Q. It is, however, desirable to maintain as high a temperature as possible on the inside flue, is it not? A. Yes.

Q. That is to eliminate, as far as possible, the combustion in the escaping gases?

A. That is one point. Of *course*, it helps to establish or provide a protection, and even in the case of a wind blowing down the vent, while the wind, itself, would be diverting the fumes, as we call them, the products of combustion—it would divert the products of combustion, in the case of a water heater sitting in a room, it is not very good to have that in the room. The case is that the down draft occurs only momentarily, and therefore the requirements are drafted accordingly, but you cannot have a down draft that will blow the flame out.

Q. You mentioned a certain committee of the A.G.A. Are there any other committees connected

(Testimony of El Roy L. Payne.)

with the building industry that you belong to or are a member of?

A. Well, I am a member of the Pacific Coast Building Officials Conference, the Pacific Coast Gas Association, Builders Exchange, and Chambers of Commerce, and things of that sort.

Q. I show you, Mr. Payne, a copy of a letter dated April 16, 1932, addressed to J. A. Stadtfeld, 563 Second Street, San Francisco, California, signed by Payne Furnace & Supply Company by (blank), [215] initialed E.L.P., which is A-2 for identification. Can you identify this letter? A. Yes.

Q. When I ask you to identify it, I mean did you dictate it, write it, sign it and forward the original? A. Yes, I dictated this letter.

Q. And signed it and forwarded it?

A. Yes.

Mr. Connor: That, I think, is Defendant's Exhibit 10-B.

The Court: I think that was received without objection, was it not, heretofore? That is already in evidence as 10-B.

Mr. Connor: Q. I show you a copy of a letter dated April 22, 1932, addressed to Mr. J. A. Stadtfeld, care of Wayland Specialties, 563 Second Street, San Francisco, California, signed Payne Furnace & Supply Company by (blank), with the initials E.L.P. Can you identify that?

A. Yes, I dictated that letter.

(Testimony of El Roy L. Payne.)

Mr. Connor: That is Defendant's Exhibit 10-D.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-D.")

Mr. Connor: Q. I show you a copy of a letter dated June 4, 1932, addressed to H. V. Payne, President Hotel, 935 Geary Street, San Francisco, Cal., which is A-13 for identification. Can you identify that?

A. Yes, I wrote this letter or dictated it.

Mr. Connor: That would be Defendant's Exhibit 10-M.

The Court: Such will be the order.

(The letter was marked "Defendant's Exhibit 10-M.") [216]

Mr. Connor: Q. I show you a copy of a letter dated December 9, 1932, addressed to J. A. *Stadfeld*, initialed E.L.P., A-23 for identification.

A. Yes.

Mr. Connor: That will be Defendant's Exhibit 10-W.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-W.") [217]

Mr. Connor: Q. I show you a copy of a letter dated May 8, 1933, addressed to J. A. *Stadfeld*, and initialed E.L.P., A-31 for identification. Do you identify that? A. Yes, I sent that letter.

(Testimony of El Roy L. Payne.)

Mr. Connor: That will be Defendant's Exhibit 10-AE.

The Court: So ordered.

(The letter was marked "Defendant's Exhibit 10-AE.") [218]

Mr. Connor: Q. I show you a letter dated June 8, 1933, addressed to J. A. Stadtfeld, A-34 for identification.

A. Yes, I wrote that.

Mr. Connor: That will be Defendants' Exhibit 10-AH.

The Court: Correct. Admitted.

(The letter was marked "Defendant's Exhibit 10-AH.")

Mr. Connor: Q. I show you a copy of a letter dated June 9, 1933, addressed to J. A. Stadtfeld, initialed E.L.P., A-35 for identification.

A. Yes, I wrote that letter.

Mr. Connor: That will be Defendants' Exhibit 10-AI.

The Court: Correct. So received.

(The letter was marked "Defendant's Exhibit 10-AI.")

Mr. Connor: Q. I show you a copy of a letter dated June 16, 1933, addressed to J. A. Stadtfeld, initialed E.L.P., A-37 for identification.

A. Yes.

Mr. Connor: That would be Defendant's Exhibit 10-AK.

(Testimony of El Roy L. Payne.)

The Court: Correct.

(The letter was marked "Defendant's Exhibit 10-AK.")

Mr. Connor: Q. A copy of a letter dated June 23, 1933, addressed to Mr. Jack Stadtfeld, initialed E.L.P., A-39 for identification. A. Yes.

Mr. Connor: That will be Defendant's Exhibit 10-AM.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-AM.")

Mr. Connor: Q. A copy of a letter dated September 21, 1933, addressed to J. A. Stadtfeld, initialed E.L.P., A-42 for identification. A. Yes.

Mr. Connor: That will be Defendant's Exhibit 10-AP.

The Court: So admitted.

(The letter was marked "Defendant's Exhibit 10-AP.") [219]

Mr. Connor: Q. I show you a copy of a letter dated November 3, 1933, addressed to Standard Asbestos Company, 736 Folsom street, San Francisco, California, initialed E.L.P., A-44 for identification.

A. Yes.

Mr. Connor: That will be Defendant's Exhibit AR.

The Court: So received.

(The letter was marked "Defendant's Exhibit 10-AR.") [220]

(Testimony of El Roy L. Payne.)

Q. In your present position with the defendant company, and its predecessor, say extending over the past ten years—as I understand you have testified you are at present vice-president and general manager? A. Yes.

Q. How long have you been vice-president and general manager?

A. Well, I would say for nine or ten years.

Q. I am speaking now not only of the present company, but its predecessor.

A. Prior to my becoming vice-president and general manager I was just general manager before that time, and I have been general manager ever since the corporation was formed.

Q. That was what year?

A. Well, I think the corporation, the Payne Furnace & Supply Company is probably 17 years old, I believe, or thereabouts.

Q. Then during that period of time, and particularly for the past ten years, have you been the directing head of the corporation? A. Yes.

Q. Both of them, the present and the past?

A. Yes.

Q. As such, you dictate all of the operations of the company, as far as employment, and wages, and matters of that kind are concerned? A. Yes.

Q. And the making of the contracts, and the like, you are the sole individual who finally passes on matters of that kind?

(Testimony of El Roy L. Payne.)

A. Yes. Of course, there is a limit to my authority to make contracts and agreements. Of course, I have to have them approved by the Board of directors.

Q. We will say employment contracts.

A. Yes.

Q. How long have you known Mr. Jacob A. Stadtfeld?

A. I believe I first met him around 1925 or 1926.

[221]

Q. What was he doing at that time?

A. He was selling pipes, as I remember, I think they called them Insulex.

Q. Was that an insulating material?

A. Insulex, itself, is an insulating material, and then the insulex vent pipe was a vent pipe made by using the insulex material.

Q. Was that material that had to be molded?

A. It is a material made up of clay or gypsum, or something of that kind. I have really forgotten, it has been so long ago. I have forgotten whether it was molded or whether it had a galvanized pipe on the inside of the metal. I do not recall ever having seen it made, so I do not have a distinct recollection on that point.

Q. When did you next if at all contact Mr. Stadtfeld with respect to vent pipes?

A. Mr. Stadtfeld, shortly after my first meeting with him, started to make the pipe which was later

(Testimony of El Roy L. Payne.)

termed Vitex—I don't remember whether he called it Vitex at that time I first met him, or he just started making it, but I believe he had a business, he called it Pacific Insulating Company, or something like that, I believe over here on Beale street, and he had started to make this pipe. It was later made by the Plant Rubber Company, and he put a line of this vent pipe on the outside of our building; we had a retail business at that time in Oakland, California, at 3810 Broadway, and he put a line of this vent pipe on the outside of our building.

Q. Was that the Vitex type of pipe?

A. That was the Vitex type of pipe, and I believe it was made similar to the pipe that was made by the Plant Rubber Company, but I think they painted it with some asphaltum paint, or something to protect it from the condensate on the inside and the normal weather conditions on the outside.

Q. Was that a double or a single flue vent?

A. That was just a single pipe.

Q. How were the sections joined together?

A. Well, I would not be [222] state on that, Mr. Connor, whether they had hubs on it or whether they just used a galvanized band around it, or something of that kind.

Q. When next did you have any contact with Mr. Stadtfeld, and by "contact" I mean discussions of any kind with him, or letters, with respect to any kind of vent pipe?

(Testimony of El Roy L. Payne.)

A. Well, I became quite well acquainted with Mr. Stadtfeld from that time on, and I remember of going up and watching him make this pipe up, I believe, at 38 Beale street.

Q. Can you give what year that was in?

A. Well, it would be along about 1927 or possibly 1928, and from then on. I remember that we had quite an active gas furnace association in Southern California at that time, and Mr. Stadtfeld was quite anxious to get someone to back him up and take over the manufacture and sale of this pipe, and I remember we had two or three meetings at various times with Mr. George Finney, who was secretary of our furnace association in the South, and we tried to organize a little company amongst some of the more active furnace men down there to make this pipe, this Vitex pipe, in Southern California, in which Mr. Stadtfeld was to come down there and handle the manufacture of it, and we were going to put up the money, but after two or three negotiations I noticed it never went ahead. The next thing I knew was that Mr. Stadtfeld had made this contract, or arrangement, whatever it was, with the Plant Rubber Company, to manufacture it.

Q. About when was that?

A. I would say probably around 1928 or 1929, along in there, maybe it was the latter part of 1927.

Q. Do you know whether or not the Plant Rubber Company had taken over the manufacture of Vitex pipe at that time?

(Testimony of El Roy L. Payne.)

A. I know that they took it over, because we purchased a good many thousands of dollars worth of it from them, and I was in their plant, and I [223] believe Mr. Stadtfeld took me through their plant, and showed me all about the manufacture, the ovens, and all of those things.

Q. During what period of time was Mr. Stadtfeld, to your knowledge, with the Plant Rubber Company?

A. He was with the Plant Rubber Company, I believe, continuously up until some part of 1931, when he first left there.

Q. When did you first have contact with Mr. Stadtfeld regarding your—and when I say “your” I mean your company, the Payne Furnace Supply Company—entering into the manufacture and sale of any pipe that he created, and you may refer to your correspondence to refresh your memory if you choose.

A. After, of course, the first, which I previously mentioned, the Vitex, prior to his being associated with the Plant Rubber Company, the next thing was in 1932, when we had considerable correspondence here about his experimenting with a different type of vent. I wish to state the Vitex vent had not proven entirely satisfactory in all cases, in other words, where atmospheric conditions were such that it caused a large amount of condensation from the products of combustion it would break down.

(Testimony of El Roy L. Payne.)

Q. Explain in what way atmospheric conditions and condensation would affect it, would attack the material, explain to the Court why? We are mechanics, the Court is not.

A. Well, of course, asbestos or any paper will absorb moisture, unless it has a proper protective coating to protect it from moisture, and I have experimented on lining it with a sort of paint and cement, and I know when vitex first came out they had it coated inside with bakelite, and they experimented with different kinds of ingredients, paints, etc., to protect it from this moisture. Of course, when moisture gets into the paper it causes it—the paper, itself, is made up of a lot of different layers and it would get in there [224] and it would cause a blister, a balloon, and of course it would then become soft and break down. So that the thing was to make a pipe that would not do that. After Mr. Stadtfeld left the Vitex people or the Plant Rubber Company we had considerable correspondence here which indicates that he had gone over to the Wayland Manufacturing Company and was trying to develop some device that would not do this, and the correspondence brings out here that he was trying different methods. I remember some of them. He sent down samples, I believe, of a great many of the experiments that he conducted over there. Some of them he had just plain asbestos, he would build up a roll of tube, you might term it, that was

(Testimony of El Roy L. Payne.)

just about two layers of paper, and he would build a layer of air cells and then a couple layers more of plain paper on the outside.

Q. By "air cells" you mean the type of corrugated asbestos paper which is shown here in your Payne-A-Vent, Plaintiff's Exhibit 3?

A. Yes.

Q. Air cells?

A. These provide air cells or corrugated paper.

Q. When you say "build up" do you mean you roll first a tube of asbestos on the mandrel to make the tube, and then the other layer of air cells on the outside of that? A. Yes.

Q. Go on from there.

A. You put a couple of more layers on the outside of that, which may be termed an inner tube or outer tube, with the air cells in there.

Q. An inner tube of solid asbestos and an outer tube of solid asbestos with air cell asbestos between the two?

A. Yes. But, of course, when it was complete it was cemented together. Mr. Stadtfeld experimented by wrapping cellophane in the layers of paper, that is, making one layer of paper or possibly two layers, and putting a layer of cellophane in there, then more paper around that to protect the cellophane, which would protect it from [225] moisture getting through from the inside to the outside and break it down; in other words, while

(Testimony of El Roy L. Payne.)

the inner pipe might become soft from the condensate and from the gases, that would protect it from getting through to the outside, or you might say vice versa, if it was put on the outside of the building and it was to protect it against the weather, it would keep the rain from breaking through.

Q. I notice in some of these letters reference to aluminum foil in connection with some vent pipe. What is that?

A. Well, aluminum foil is practically the same, in a way as tin-foil, only made thinner; a very thin aluminum foil, I guess, would even be thinner than this piece of paper. He experimented on wrapping aluminum foil on some of the asbestos paper for the same purpose as I have explained with the cellophane.

Q. In other words, by rolling the first tube with a sheet of asbestos on the mandrel and then rolling his tube with a layer of cellophane or aluminum foil on it, and then another layer of asbestos on the outside of that, all cemented together, to sum it up, is that correct?

A. Yes. Of course, Mr. Stadtfeld experimented in many different ways, putting aluminum foil right on the inside of the pipe, as I recall it, some in between the pipe, and in various ways, when he was trying to work out a satisfactory vent. He sent a great many samples down to me for my approval, suggestions, etc.

(Testimony of El Roy L. Payne.)

Q. What further contact did you have with Mr. Stadtfeld in connection with this vent pipe business, and during what period of time?

A. Well, we had certain correspondence continuing on from that period, and I believe the next contact I had with Mr. Stadtfeld was in the early part of 1933; in fact, I came up here with my brother right after the holidays, in fact, the exact date was [226] January 4, 1933, and met Mr. Stadtfeld, and he and my brother and I went back to Los Angeles, to Beverly Hills, to our factory together at that time. We made up some pipes down there in which, if my memory is correct, one of the samples that Mr. Stadtfeld had sent down to us was a pipe made of aluminum exactly the same as this exhibit, here, or the same as our pipe is to-day, with just air cell paper around it; Mr. Stadtfeld came down, as I mentioned, on January 7, and we made up, just how many feet of it I do not recall, but it was sufficient to send it down to the Southern California Gas Company's testing laboratory. I had made arrangements with Mr. Lee Holt, the superintendent in charge of the Utilities Distribution to test the pipe, and they accepted the pipe, I believe, in the early part of February, 1933, for test.

Q. Did you mention the name of the company Mr. Holt was connected with?

A. The Southern California Gas Company.

(Testimony of El Roy L. Payne.)

Q. As I understand it, it was a tube of aluminum with a wrapping around it of one or two layers of corrugated asbestos. Was there anything outside of that?

A. As I recall, we covered it with light canvas or muslin to hold the corrugated paper on, to sort of protect it from the weather.

Q. Now, with respect to these various vent pipes which you say Mr. Stadtfeld had been working on, and of which he sent you various samples, up to the time of this pipe that you have mentioned were any of them on the order of or in the nature of the vent pipe here in question, such as the Payne-A-Vent?

A. No, that is as far as the outer casing is concerned. The pipe I just mentioned would be the same as that with the exception of the galvanized tube.

Q. So that this vent pipe which you said Mr. Stadtfeld made up [227] at your shop in Los Angeles, California—it was at your shop, as I understand?

A. Yes.

Q. Of an inner aluminum tube and a wrapping of one or two layers of air cell asbestos—how was the air cell asbestos put on, how was it secured onto the aluminum tube?

A. It was glued by sodium silicate.

Q. Then a wrapping of muslin and canvas outside of that?

(Testimony of El Roy L. Payne.)

A. Yes. In other words, it resembled very much, the muslin there was like a steampipe covering where we allowed the muslin to project past the end, beyond the end, so that it would glue from the next joint when put together.

Q. You say these sections were made up for the purpose of handling tests made of them?

A. Yes.

Q. Tests for what purpose?

A. Well, as to durability of the aluminum to withstand the sulphuric acid and products of combustion, and for its insulating value.

Q. Did you pay Mr. Stadtfeld any money for that work?

A. No, not at that time. We paid him some previous to that.

Q. That is, he had been in your employ previous to that time?

A. Yes, in 1932. I believe in May and June we were paying him for doing some of this experimental and development work.

Q. Over what period of time did you employ him?

A. I believe for a period of six weeks. I have my records and cancelled checks for that.

Q. Have you the cancelled checks that you can fix the date? A. Yes.

Q. Will you please get them, so that we can get the dates in the record?

(Testimony of El Roy L. Payne.)

A. The first check I gave Mr. Stadtfeld was May 11th, which was to take care of some materials that he had purchased in the development work.

Q. May 11 of what year? A. 1932. [228]

Q. What was the amount of the check?

A. This was for \$15.

Q. For materials?

A. That is as I recall it, it was materials. I was unable to get the cancelled checks on this one, it is dated May 26th. The reason was the First National Bank of Beverly Hills went into receivership and we never got our cancelled checks back from the bank, but I do have the cancelled checks later on.

Q. What was the amount of that May 26, 1932?

A. \$125. I also have one of the same date for \$22.25 for some materials. Then I have a cancelled check on June 11, 1932, for \$125, and another one dated July 13, 1932 for \$125.

Q. Now, explain the nature of the services rendered by Mr. Stadtfeld, what the arrangements were and what he did.

A. Mr. Stadtfeld was developing these vents I previously explained, and we figured in spending this money that if he developed a satisfactory vent pipe that we would start manufacturing it. He was developing this vent, you might say, with his services, and what we were paying him—we were sort of in cahoots on it—he was doing it for us.

(Testimony of El Roy L. Payne.)

Q. Was the employment just to develop a satisfactory vent pipe with the understanding that if he did you were to go ahead and manufacture it—that is, he was doing the research work for you, employed for that purpose? A. Yes.

Q. About when did that relationship terminate?

A. I could get at the date by the correspondence. I remember seeing the exact letter a few minutes ago when I wrote to my brother, Harry, who was in San Francisco at the time, telling him that he had to see Mr. Stadtfeld and terminate that arrangement, because we were in pretty bad shape, with the bank closed, and we had to establish new banking connections, and we just had to stop further expense and development work. That, I believe, was in June there sometime [229] in 1932. I notice a letter on June 9th that I wrote Mr. Stadtfeld about the bank being closed.

Q. You say on June 9th?

A. Yes, you notice this letter of June 9, 1932 that I wrote to Mr. Stadtfeld.

Q. Is that the letter of June 4, 1932 that you are referring to?

A. Yes. That was the one where I told my brother to see Mr. Stadtfeld and tell him that we would have to stop this arrangement because I could not afford to pay him any longer.

Q. How much did you agree to pay Mr. Stadtfeld for his services?

(Testimony of El Roy L. Payne.)

A. We were paying him \$250 a month, \$125 every two weeks.

Q. During that time did he produce anything satisfactory in the nature of vent pipe?

A. Nothing that was acceptable.

Q. Had he in any way represented to you prior to that time that he thought he could develop something that would be satisfactory and would be a salable article, and an improvement over these other vent pipes? A. Yes.

Q. Had he been up to that time, say May, 1932, in any way prevailing upon you to adopt any of his ideas on vent pipes, or give him employment? According to your correspondence there do you recall of any such representations up to that time, we will say up to June 4, 1932?

A. Will you state that question again?

Q. Will you read the question?

The Court: Read the question.

(Question repeated by the reporter.)

A. I do know, of course, that Mr. Stadtfeld was very enthusiastic about the vent pipe business, and each one of these pipes that he would submit there with cellophane in or this aluminum foil, and all of them, he always thought he had the right thing, and then something would come up that it would not prove satisfactory, or what-not, and I believe the correspondence brings out—— [230]

The Court: That speaks for itself.

(Testimony of El Roy L. Payne.)

Mr. Connor: Yes. I can stop right now, if your Honor wishes.

The Court: We will take an adjournment now until tomorrow morning at ten o'clock.

(An adjournment was here taken until tomorrow, Thursday, March 3, 1938, at ten o'clock a. m.)

[231]

Thursday, March 3, 1938.

EL ROY L. PAYNE,

Direct Examination

(Resumed).

Mr. Connor: Q. When we adjourned yesterday afternoon you were referring to a period in May and June, 1932 when you employed Mr. Stadtfeld to develop some new type of vent pipes for you. Can you refer to the correspondence in evidence, Exhibit 10, and state what letters in there that he wrote to you refer to that period of time in his operations during that period of time, if any?

A. Well, Mr. Stadtfeld was down at Los Angeles, and he came back to San Francisco and started to work on this development work, and in the letter of May 12, 1932—

Q. Just refer to the letter by exhibit number.

A. 10-J, he asked me if the ghost would walk on the 15th.

Q. That letter was dated when?

(Testimony of El Roy L. Payne.)

A. May 12, 1932. Then on June 4 I have a letter in which I wrote to my brother, in which I told him that the way business conditions were we would have to discontinue with Mr. Stadtfeld's services on June 15 in regard to this development work.

Q. That is the development work on the vent pipe?

A. Yes. That exhibit is here listed as 10-M.

Q. About when did you terminate his services on that development work?

A. Well, they terminated on June 15.

Q. Then after that what contact did you have with Mr. Stadtfeld, either personally or by way of correspondence regarding vent pipes?

A. We had, of course, considerable correspondence from then on to the time on January 4th when I came up to San Francisco in 1933 with my brother and talked to Stadtfeld at that time, and he returned with my brother and myself by automobile, in my brother's car, back to Los Angeles. [235]

Q. For what purpose?

A. We were going to make up some vent pipe down there using aluminum inside and a wrapping of two layers of air cells; I think we termed it Allu-micell.

Q. Was that aluminum foil or aluminum pipe?

A. No, it was aluminum pipe.

Q. What followed when you returned to Los Angeles in the early part of 1933?

(Testimony of El Roy L. Payne.)

A. Well, we made up some pipe in our plant down there.

Q. Just describe exactly how it was made up.

A. We first had to make some mandrels to hold the aluminum on which to roll the air cell paper, or corrugated paper, around the aluminum pipe, and then we baked it in our regular enameling oven.

Q. Cementing it together with the air cells?

A. Yes, with the sodium silicate, and the solution which Mr. Stadtfeld made; he was there, I do not recall the exact number of days, but somewhere around a week or ten days, and then returned to San Francisco. I contacted at that time Mr. Lee Holtz, who was superintendent of utilization and investigation of the Southern California Gas Company, and asked him if he would conduct a test on this vent pipe, as I was very desirous of knowing how aluminum would stand up under the acids and the gases. This pipe was submitted to Mr. Holtz, or to the Southern California Gas Company laboratory, in the early part of February, 1933, and we received, as I remember, their first report—I have it here.

Q. You may refer to it to refresh your memory.

A. I have the first report here with Mr. Holtz's letter dated May 22, 1933.

Mr. Owen: If your Honor please, I do not believe that it is necessary to go into any test of any pipe that is not the pipe of the patent in suit. This

(Testimony of El Roy L. Payne.)

Allumicell I do not believe is claimed to be the pipe of the patent in suit.

Mr. Connor: That is true. [236]

Mr. Owen: It is a collateral issue.

Mr. Connor: No, it is not a collateral issue. We are giving the history of the development of this pipe that the plaintiff contends amounts to invention, and we are endeavoring to show that it did not amount to invention. These are steps in the development of that particular pipe. We merely want to show the Court how the development came about. We are contending that Mr. Stadtfeld is not the first inventor of this vent device. This is a step that was gone through in the development of that pipe which Mr. Stadtfeld claims is his invention, and which we contend is not. The evidence is very pertinent on that point.

The Court: I will allow it, then.

A. Mr. Holtz in his report speaks very highly of the pipe, that is, the tests that he had conducted with it.

Mr. Connor: Does he describe the pipe he tested in his report? A. Yes.

Q. How does he describe it?

A. "This pipe consists of a tube made of sheet aluminum which has been double wrapped with corrugated asbestos paper. A binder has been used as a cement which is composed mostly of sodium silicate." He states here: "The only point of objec-

(Testimony of El Roy L. Payne.)

tion so far that might be raised is, one of exposure to moisture, and the effect of condensed water that might form between the pipe and the wrapper" etc. I know Mr. Holtz very well personally, having associated with him, that is, through our connection with the gas company a great many years, and I talked with Mr. Holtz personally about this at the time and explained to him that of course we would not consider putting a pipe of this kind where it would be affected by moisture conditions without encasing it in an outer pipe, and I mentioned to him our standard Bulletin No. 310, which we had issued prior to this time, [237] instructed our agents and dealers to always encase the pipe when it was installed on the outside of a building in an outer pipe.

Mr. Owen: I would like to renew my objection. Assuming that this evidence is offered for the purpose Mr. Connor suggests, you cannot anticipate a patent by the inventor's own work in building up to invention. That is what they are trying to do. I do not think that is proper, because the inventor often stumbles around, and finally lights on the combination of elements and the way of putting them together that accomplishes the invention. For that reason I do not think this is proper.

Mr. Connor: I think that objection goes to the weight of the evidence rather than its materiality. It is for the Court to determine whether or not the inventor took these steps, himself, to complete this

(Testimony of El Roy L. Payne.)

invention, himself. Naturally, as counsel says, you cannot say that that invention is not made because he has not gone through various stages of development.

The Court: Your contention then is exactly what—that he did not discover it at all?

Mr. Connor: That he is not the first inventor, that these steps which were taken and discovered by other people were later adopted by the inventor in this case and claimed as his invention. We contend that it is not his invention. Therefore, it is just as material, I will say, as an inventor who may start with a very great idea and show how he worked up to final perfection of his invention; the same thing is true with the working up of final perfection of something that is not his invention, to show it is not his invention. One is just as material as the other. It depends on who did the development work, whether the inventor or somebody else did the development work. That is our position.

Mr. Owen: My reply is if they are going to show that someone [238] else invented the pipe that is all right, but if they are going to show that Mr. Stadtfeld worked it up, I do not think that is relevant.

The Court: They are showing who invented it.

Mr. Owen: With that understanding I have no objection.

The Court: You are now contending he did not invent this, are you not?

(Testimony of El Roy L. Payne.)

Mr. Connor: We are contending that he did not invent it.

The Court: You are trying to establish somebody else did. Proceed.

Mr. Connor: Q. Prior to this particular test that you refer to, had Mr. Stadtfeld made any suggestions to you whatsoever of applying an outside metal tube to that particular type of vent pipe, or just covering it with a canvas?

A. That is all he had ever done, to my knowledge, was put canvas around it. He had never discussed that with me prior to the time I wrote him. I sent him a copy of the letter of Mr. Holtz, at which time it was suggested that a casing be put around it.

Q. This report you have just referred to, was that received by you from Mr. Holtz?

A. Yes.

Q. Is it accompanied by a letter of transmittal signed by Mr. Holtz? A. Yes.

Q. Do you know Mr. Holtz's signature? Have you known him personally—in fact, have you known him long enough to know his signature?

A. Yes.

Q. Is that his signature attached to the letter of transmittal, would you say?

A. It is. This is the first report he made. There are later reports.

Q. There is a letter of transmittal with the report you have just referred to. Now, there is some

(Testimony of El Roy L. Payne.)

further correspondence attached to this. Will you proceed to identify that other correspond- [239] ence if you can. I see it is all fastened together.

A. Yes. This is another report by Mr. Holtz dated September 22, in which he enclosed additional tests, to which they had progressed up to that time. The next report is dated February 16, 1934, in which there is a final report received from him. The tests took over a year, possibly a year to make, to give a good durability test of the aluminum, as that was the important thing that we were interested in.

Q. The receipt stamp of the Payne Furnace & Supply Company evidences the date that they were received by you?

A. Yes, May 24, 1933, September 26, 1933, and February 19, 1934.

Q. Is all that correspondence signed by Mr. Holtz?

A. Yes. The actual tests, themselves, are signed by one of the testing engineers. The letter accompanying them is signed by Mr. Holtz, personally. It is just the first report that is signed by the engineer. The rest are just attached to Mr. Holtz's letter.

Q. They were all received, were they, at those particular times, of those dates as noted by your receipt stamp?

A. Yes.

(Testimony of El Roy L. Payne.)

Q. You discussed the matter further with Mr. Holtz and know that these tests were made in his department?

A. Yes, I did on several occasions. The gas companies, in submitting tests of this kind, have to be careful of what they put in there for fear that a manufacturer might use their test in publication, which, of course, is against their policy. So we had some discussions, or, rather, conversations over the telephone about the test.

Q. What was the final report on the characteristics of the aluminum tube?

A. Well, it was a very fine report, Mr. Connor. They made tests in solutions of sulphuric acid, etc., to test the corrosive or resistance quality of the aluminum and that is the thing we were interested in, for fear that the aluminum might pit, [240] get holes in it, and after a year's continuous test practically it showed very fine results.

Q. Was it the characteristics of the aluminum that you were primarily interested in?

A. Yes.

Mr. Owen: I object to the report.

Mr. Connor: I have not offered it yet. I offer the correspondence referred to by the witness as Defendant's Exhibit 11.

Mr. Owen: I object to the last two pages of this exhibit offered, comprising an unsigned carbon copy, which is not referred to by date or anything

(Testimony of El Roy L. Payne.)

else in the body—I find there are three pages—but it is unsigned, and it is only a copy and not the original, and I object to its admission on that ground.

A. I did not mean to have that on there, because that is a copy of the previous pages that we made as copies for you. Those are exact copies of the other.

The Court: It will be received then as Defendant's Exhibit 11 in evidence.

(The correspondence was marked "Defendant's Exhibit 11.")

Mr. Connor: Q. Where was Mr. Stadtfeld during the period of time that these tests were going on from May, 1932 to about February, 1933? Had you had correspondence with him directed to where he was residing at that time?

A. We wrote him, I think it was about February, 1933, that is, after his return back to San Francisco from Los Angeles, and we addressed the letter to our San Francisco office, as he came around there quite frequently, and I believe that was the only place where we knew where to write him at that time. It was probably, I would say, in April sometime before he replied to the letter, as he had sort of stopped going around after his mail, and I remember our San Francisco office wrote back to us that he had not been around there. Then we wrote our [241] San Francisco office giving them

(Testimony of El Roy L. Payne.)

his home address, as I recall, and it was quite some time before he got that letter; I believe in April he had gone back to work for the Plant Rubber & Asbestos Company.

Q. Are there any letters in Exhibit 10 that show that?

A. Here is a letter, I think it is April 10, 1933, Exhibit 10-AA, in which he states that "In the meantime I have returned to the Plant Rubber Company to straighten out their difficulty."

Q. You do not need to read from the letter, but refer to it. Had you forwarded Mr. Stadtfeld a copy of this report or advised him of the final outcome of these tests?

A. Well, I forwarded him a copy of that first test received from Mr. Holtz, I believe, sometime in May, I don't remember exactly.

Q. In his correspondence did he later refer to it? The correspondence will show exactly what he said—indicating that he had received information as to the result of these tests?

A. Yes, the letter indicated that he acknowledged it and made comment about lining the pipe outside, that that would be an easy matter to do, of course.

Q. Had you made any suggestion to him about encasing that structure that had been tested in an outer metal tube? A. Yes, I had.

(Testimony of El Roy L. Payne.)

Q. During that time, or prior to that time had you had experience with these other vent pipes which were liable to disintegration under conditions of moisture and determined the advisability of encasing these vent pipes in outer metal tubes?

A. Yes. The Plant Rubber & Asbestos Company, I remember, put out a circular showing a line of Vitex installed on the outside of a building, and when Mr. Chase, who I believe was sales manager of the Plant Rubber & Asbestos Company, came down to Los Angeles I criticised him very much for putting out the bulletin, which was contrary [242] to our own instructions of proper installing of Vitex. I showed him at that time where Bulletin No. 310, which is a part of our sales and service manual, brings out that point very expressly.

Q. That is encasing it in a metal tube when it is on the outside of a building?

A. Yes. After he returned to San Francisco I believe it was on July 9, 1933, he acknowledged our discussion and I forget just what the contents of the letter were, but he more or less stated that they were in accord with my views and would take steps to correct that bulletin.

Q. After these tests made by the Southern California Gas Company did you understand what the last paragraph of Mr. Holtz's report there meant, that you read from, that is the exposure to outside moisture, what that meant?

(Testimony of El Roy L. Payne.)

A. Why, yes, it meant that the atmospheric conditions, or rain, or what-not would soften up the paper and cause it to soften and become loose from the pipe and then the pipe would be uninsulated.

Q. That was the information you communicated to Mr. Stadtfeld?

A. I not only communicated it but I sent him a copy of Mr. Holtz's report.

Q. Now, when did you next hear from Mr. Stadtfeld in connection with this matter?

A. Well, we exchanged a few letters from that time up to I believe in April, I should say, July of 1933, when he wrote me that he had left the Plant Rubber Company and had made arrangements with Mr. Walter Derbyshire, of the Ace Sheet Metal Works, to manufacture a vent which he called Duplex Metal vent, and he sent me a blueprint or a drawing showing the construction of this pipe.

Q. Is that the drawing, Defendant's Exhibit 10-AO referring to in the letter of July 17, 1933, which is Defendant's Exhibit 10-AN?

A. Yes, that is the drawing in the letter. [243]

Q. Is that the first time Mr. Stadtfeld had communicated any information to you regarding that particular vent pipe?

A. Well, this is the first time that I had been advised of his making a connection or going into the manufacture of it.

Q. Of that particular pipe? A. Yes.

(Testimony of El Roy L. Payne.)

Q. Now, go on from there and state what further communication you had with Mr. Stadtfeld and what relations you had regarding vent pipe?

A. Well, I wrote Mr. Stadtfeld care of the Ace Sheet Metal Works, acknowledging his letter——

Q. About what date was that?

A. On September 21. Do you want the exhibit number?

Q. Yes.

A. 10-AP. I apologized for being so long in answering his letter, that I had been back East, and I merely commented on his pipe to the effect that I thought it was a good pipe, but the fact that it could be made up in any sheet metal shop, because of its construction, I did not see much chance of marketing it to any great extent.

Q. Did he send you a sample of that particular pipe?

A. I do not recall of receiving a sample at that time.

Q. Did you later on?

A. Well, after I wrote him this letter I then got a reply from him that he had only been with Derbyshire a short time and he was now with the Standard Asbestos Company, Mr. Dutton, and he told me in his letter of September 26th, he advised that he had not made satisfactory arrangements with Mr. Derbyshire, and he was now with Mr. Dutton, and they were going ahead and manufacture it there.

(Testimony of El Roy L. Payne.)

At that time he mentioned that he would send me a sample of the pipe, and later on he did send me a sample of the pipe.

Q. Just a short sample of it?

A. Well, I do not recall whether it was a short sample or probably a 36-inch length—I would not [244] say as to that.

Q. Describe the sample, as to just how that was made up.

A. Well, that was just made up of an inner tube of aluminum, with two layers of corrugated paper wrapped around it, and an outer tube of galvanized iron slipped down or encased it, whichever way you wish to say.

Q. As the pipe is made at the present time?

A. As the pipe which we are now making, yes.

Q. Did he say anything about having a patent on it, or anything of that kind?

A. Well, he mentioned, I think he mentions in here that he had filed application for a patent. Yes, he states that we have applied for a patent and the attorneys feel that there are four or five kinds that are bound to be allowed, etc.

Q. That is the only reference he ever made to the application for patent?

A. Well, of course, in many of the other developments he had mentioned how he applied for a patent, but I believe this is the first that he mentioned in this particular pipe where he had applied for patent.

(Testimony of El Roy L. Payne.)

Q. What was your reaction to that?

A. Well, I just wrote him back here on November 3, right after I had received this sample, in which he had the sample marked "Patent applied for," and I just commented on it, that I wished him luck in getting a patent on it, as the same type of vent had been used in Los Angeles for some twenty years. On October 14 he sent a price list down.

Q. As I understand now, Mr. Payne, the sample of pipe that he sent you that he referred to in that drawing as Duplex Vent, is the same pipe that had been tested by the Southern California Gas Company as early as May, 1933, except that it had an outer galvanized tube slipped over the asbestos?

A. The only difference would be that the pipe submitted to the Southern California Gas [245] Company, was that the corrugated paper was attached to it by means of sodium silicate to hold it firmly in place, where the Duplex Metal Vent, of course, according to the drawing of it, if it was the same as the sample that he later sent from the Standard Asbestos Company, it was just wrapped around loosely and not attached to the aluminum pipe.

Q. What I mean is, except for the asbestos being cemented to the inner aluminum pipe—

Mr. Owen: I object to that as being a leading question, and suggestion to the witness the answer

(Testimony of El Roy L. Payne.)

he wants. He did not get a good one the first time.

Mr. Connor: I am just quoting what the witness previously testified to.

The Court: I will allow it.

Mr. Connor: Q. Aside from the fact that the asbestos was cemented to the inner aluminum tube to hold it in place, over which a galvanized sheet might be slipped, the sample he sent you was just the same; is that correct? A. Yes.

Q. Now, proceed with any further relations or correspondence you had with Mr. Stadtfeld after that.

A. When I wrote him on November 3 that I did not think much of the possibility of his getting a patent, he replied on November 6th that he was past the worrying stage in this connection, and while some amendments were being made we will receive ample protection against infringement of the particular type of pipe and fittings which we are making. I assumed from that that he had filed a patent application.

Q. Did he ever at any time thereafter show you or say that he had made any application for patent at that time?

A. He told me that he had taken the matter up with his patent attorneys.

Q. I mean other than that, you don't know whether he had or had [246] not filed application for a patent?

(Testimony of El Roy L. Payne.)

A. Not other than what he states in here. On December 8——

Q. What year?

A. 1933—I remember in one of my previous letters here where he had sent a sample down with the corrugated paper, I also commented, from what I knew of the insulating value of the pipe, that I thought dead air cells would be just as good, and he replied back on December 8th and said that was not true, because he had conducted exhaustive tests on it and that the pipe with the corrugated paper is much superior, and naturally I felt if he had actually made them and tested them that would be a fact.

Q. To straighten out that particular point, the corrugated asbestos paper, does that or does that not provide an air space also throughout the length of the pipe?

A. It does provided the paper has not been squashed. It is the intention, of course, to provide air cells through there. It is the intention, of course, to provide air cells through there, that is the reason I call it air cell asbestos.

Q. That is a combination of asbestos together with the air cells? A. Yes.

Q. What next did you hear from Mr. Stadtfeld?

A. After that Mr. Stadtfeld made a trip to Los Angeles.

Q. About what time?

(Testimony of El Roy L. Payne.)

A. That was in the early part of 1934. I do not seem to have any record of it and I just have to go with my memory on that, but it must have been probably in the middle of February, 1934; that is when he came down and told us that Mr. Dutton didn't want to continue with the manufacture of this pipe, he was short of funds, and he wanted to get out of the business.

Q. Was Mr. Dutton, to your knowledge, equipped to manufacture this type of vent pipe, was his shop equipped to manufacture it? [247]

A. No.

Q. What was his business?

A. His business was insulating business, and the manufacture of this material would, of course, require more of a sheet metal manufacturing plant.

Q. He did not have that type of plant?

A. No. Mr. Stadtfeld told us that he was owing the Williams Wallace Company quite a little money for materials that he had purchased from them in the way of aluminum pipe, and galvanized iron for the vent, and that he wanted to get out of the business so that he could have money enough to pay them, etc. So we had received these reports from the Southern California Gas Company, and I had as well a talk with Mr. Geyer, one of the research engineers of the Southern Counties Gas Company about the durability of aluminum, and it so happened that Mr. Geyer was in the Massa-

(Testimony of El Roy L. Payne.)

chusetts Institute of Technology at the time that they conducted tests on aluminum back there, and he told us the satisfactory results——

Mr. Owen: I object to it unless he told it to you personally.

A. He did.

Mr. Connor: You had better say “me” instead of “us.”

A. He explained to me how the acids in the gas formed a white protective coating on the inside of the aluminum, but that it did not eat into the aluminum, and afterwards you could brush off this white protective coating that had been formed through this chemical action, and that the aluminum would be perfectly good underneath. So it was due to these reports from Mr. Geyer and Mr. Holtz that we were convinced that aluminum was a satisfactory vent. At that time we were having so much trouble with Vitex that we decided to start making this pipe, and communicated with Mr. Stadtfeld about coming down to work with us and take over this business for us. [248]

Q. Now, had that vent pipe manufactured by Mr. Stadtfeld or Mr. Stadtfeld and Mr. Dutton—had they been using the name “Metalbestos” on it?

A. Yes.

Q. Did that enter into the picture at all? Did you have any discussion about the trade name?

A. Yes. The understanding was that we were to

(Testimony of El Roy L. Payne.)

buy the materials that Mr. Dutton had, that is, the unfinished materials.

Q. That is, you mean your understanding with Mr. Stadtfeld at that time? A. Yes.

Q. Did he represent to you that he was representing Mr. Dutton in the matter, or talking for Mr. Dutton and himself?

A. Well, he did not state that he was representing Mr. Dutton, but that he would make these arrangements with Mr. Dutton when he went back. I do not believe it was at that time that he stated that he had discussed it with Mr. Dutton, but after he had returned to San Francisco he wrote us that he had discussed it with Mr. Dutton, and he would turn over the rights to us.

Q. Did you understand from what Mr. Stadtfeld stated to you at that time whether the Metalbestos vent pipe business was Mr. Stadtfeld's or Mr. Dutton's, that is, whether Mr. Dutton was manufacturing the pipe for Mr. Stadtfeld or whether Mr. Stadtfeld was just working for Mr. Dutton? What was the representation on those points?

A. Mr. Stadtfeld was just working for Mr. Dutton, that is at least what he informed us, and handling this vent pipe business for Mr. Dutton; in other words, he was manufacturing this, you might say, or assembling it, and taking care of the sales, etc., for Mr. Dutton.

Q. As I understand your testimony, and you so testify at the present time, Mr. Stadtfeld's repre-

(Testimony of El Roy L. Payne.)

sents were that Mr. Dutton wanted to dispose of his stock and get out of this vent pipe [249] business: is that it? A. Yes.

Q. And that Mr. Stadtfeld would negotiate with you if you would take on the manufacture and sale?

A. Yes.

Q. What followed?

A. We did not give Mr. Stadtfeld a direct definite answer as to just what we would do, and he returned to San Francisco to see just what arrangements could be made with Mr. Dutton. Then we have his letters, of course, that speak for themselves, which he wrote us, February 28th——

Q. 1934?

A. 1934, in which he outlined then a list of aluminum pipe and things which Mr. Dutton had on hand and wanted to sell to us. As to the finished pipe that Mr. Dutton had on hand, our San Francisco Branch was to take a portion of that, and he stated that the Pittsburgh Water Heater Company would take whatever balance they had on hand; in other words, take all of the unfinished and finished pipe from Mr. Dutton. And he stated in there that Mr. Dutton will write you as soon as the stock is turned over, giving you full rights to manufacture, as far as he is concerned.

Q. That was the understanding, that Mr. Dutton was going to retire from the business, and that you were going to proceed with the business previously conducted by Mr. Dutton?

(Testimony of El Roy L. Payne.)

A. Yes. Then we wrote Mr. Stadtfeld on March 2. We had made investigation in this case in the meantime to see whether we could have these elbows made down there, a sort of stove-pipe elbow, sometimes they are termed conductor pipe elbow, and it requires special machines to make them, which we did not have. We had investigated down there the possibility of their being made, and we could not find anyone that had a satisfactory machine, so we wrote Mr. Stadtfeld to get prices from the Williams Wallace Company for making the aluminum elbows and galvanized elbows for us in large quantities, and we listed the quantities for him to see about. [250] Mr. Stadtfeld wrote us, he wired us on March 16, and he wanted to know when we could get started, and then again on March 20 he wrote us a letter along the same lines, wanting to get going. Then he wired us again on March 23, and that is when my brother and I had the talk and decided we would go ahead at once, and at my instruction he wrote him a letter on March 24 outlining the basis of his compensation.

Q. Did you refer to having vent pipes submitted for approval—I may be mistaken as to whether you did—did you submit it to the city authorities for inspection, to obtain the approval of the building department in Los Angeles?

A. Yes. Of course, that was one thing we were hesitating about, going ahead, until we had obtained

(Testimony of El Roy L. Payne.)

approval of the various cities, because it was impossible to sell this material until it had been approved. So we wrote Mr. Stadtfeld sometime in March and sent him a purchase order on the Standard Asbestos Company for the quantity, I don't know the exact number of feet of pipe and fittings, so that they could be sent to the Smith-Emery testing laboratory and have them tested in the manner outlined by the Building Department of the City of Los Angeles. This pipe came down and the same was turned over to the Smith-Emery Company for testing, and I believe we received a test on April 24th or 27th, somewhere along there.

Q. You mean the result of the test?

A. Yes. Then we had to take that test and send it to the Board of Building Safety of the City of Los Angeles and get the approval of them. I believe it was May 28th before we finally got approval from the City, because they had certain objections to the original pipe which was submitted.

Q. May 28th, what year?

A. 1934. One of them was that [251] they demanded that we put a definite marking on the pipe so that the inspectors could readily identify it as being metalbestos pipe, and they also required a bead be put around the inner end of the aluminum pipe so that it would not slip down too far and have a poor connection. We had this die made by the Folsom-Norden Company, I believe,

(Testimony of El Roy L. Payne.)

in the latter part of April, I think April 27, that the die was completed.

Q. What year?

A. 1934. We then submitted a sample to the City of Los Angeles with this metalbestos embossed in the pipe and in due course of time we got approval, as I stated before, on May 28, 1934.

Q. Why, according to your knowledge and experience, and information gained from the building department, does the department require that an article of this kind be definitely marked?

A. So that the inspector can identify it, because when that article would be installed in a building it looks from the outside just the same as an ordinary, we will say, 4-inch galvanized pipe, because they have no way of seeing what is in the inside. But the manufacturer having a definite trade-mark and stamping the name in it, they can be sure if it is the pipe that has been approved.

Q. That is, in its approval it is identified by the trade name, is that it? A. Yes.

Q. What period of time did it take to obtain these tests from Smith-Emery & Company and to obtain the approval of the pipe by the Building Department?

A. That took a period of about sixty days; I think we submitted it to Smith-Emery in the first part of April, and we did not get the approval from the City Building Department in Los Angeles until May 28th. I notice here that we submitted

(Testimony of El Roy L. Payne.)

it on March 27th to Smith-Emery, and we received approval [252] on May 28, 1934.

Q. The Smith-Emery report was favorable?

A. Yes. And the actual test was witnessed by Mr. Wicks, who is head of the Heating Department for the City of Los Angeles.

Q. What next was done that involved the manufacture of this pipe?

A. Mr. Stadtfeld came to Los Angeles, I think on April 4; he moved down there with his family to take up his work, and of course he was put in charge of this vent pipe business, and his duty was to follow through that Smith-Emery test, supervise those tests, and be of any assistance he could. In the meantime we opened up the office on Robertson Boulevard property that we had over there.

Q. That is, just back of your plant?

A. Well, it is about six or eight blocks from our plant, and we were going to conduct this metal-bestos vent pipe business over there rather than handle it in our own factory. We hired a young fellow and turned him over to Mr. Stadtfeld; he was working under him over there, and he was to do the assembling and manufacturing under Mr. Stadtfeld's direction. In addition to supervising the tests at Smith-Emery he assisted our Mr. Hyatt, who is our advertising manager, in the preparation of the Metalbestos Bulletin, the first one of which was printed on May 8th, and after we received the

(Testimony of El Roy L. Payne.)

approval from the City of Los Angeles it was his duty to try to obtain the approval of other cities. He was successful in a few of those, but as most of those are members of the Pacific Coast Building Officials Conference they will not approve materials unless it has first been passed by the Conference Committee, as they termed it, and they had as their director Mr. Merrill, who was the Secretary and Manager—I guess that is what they term him—and he refused to recognize the test of Smith-Emery [253] because he had personally not witnessed the test. So we had to have it done all over again, have it re-tested so Mr. Merrill could witness it, and we did not get the second test completed until—I have the date some place—I think it was late in the fall. I cannot refer to it now. We finally got it approved by the Pacific Coast Building Officials Conference, which gave us the right to use it in a great many cities. It was, of course, Mr. Stadtfeld's duty to get out and sell this pipe, and he spent quite a lot of time trying to do it in wholesale plumbing supply houses and various jobbers of that kind. We did not find it successful to operate the Robertson Boulevard plant after we had tried it about ninety days, so we decided to move the manufacture and assembly of this pipe back to our main factory, which we did, and then transferred a lot of our stock of furnaces over to the Robertson Boulevard place, because the man that would be making Metalbestos over there re-

(Testimony of El Roy L. Payne.)

quired certain supervision, and then it would save the transportation of hauling the pipe back and forth. After we got the approval from the City of Los Angeles we started using this pipe, ourselves, making the first installation; in fact, the day before we got the approval of them, although I had first been advised it had been approved, although I had not received the official notification. The minute we got the bulletin complete, which I said was May 4, we started to mail these.

Q. May 8, 1934?

A. May 8, 1934, we mailed these out to our regular mailing list, I believe on May 15, 1934, to some 810 of our dealers, jobbers and utility companies whom we did business with.

Q. Now, before we get to that, Mr. Payne, let us go back and clear up just what arrangement you made personally with Stadtfeld, you personally made with Mr. Stadtfeld regarding the taking over of [254] the manufacture and sale of this vent pipe?

A. Well, when Mr. Stadtfeld was down there in February we discussed our arrangement, and it was agreed upon \$150 a month, and at such time as the business developed and increased his salary would be increased accordingly.

Q. That is, he was to take charge of the manufacture and sale of this pipe and his further compensation depended upon his success in marketing it?

A. Yes.

(Testimony of El Roy L. Payne.)

Q. At the time you made this arrangement were any patents or royalties discussed at all?

A. No.

Q. Was it just a straight salary?

A. There was no discussion of any royalties or patents at that time.

Q. Do you recall when this arrangement was made when you agreed to pay him \$150, what he said to you and what you said to him, giving as nearly as you can the substance of the conversation?

A. I do recall that on two or three occasions we had about salaries or commissions, etc., that he always expressed confidence in me, and that he was agreeable to go to work at \$150 and knew that he would be treated right when the business would be developed. Of course, prior to that time he had written me about the patent that he had applied for, and patent advice, but the only discussion about patents, at all, was that if we felt that there was anything patentable about it we would apply for a patent. That was in February.

Q. Of what year?

A. 1934, when we were discussing this arrangement. In the meantime, Mr. Connor, you probably recall that you were in Washington and I sent you a sample of this pipe and asked you to search the records, and you wrote me a letter, I believe, dated April 7, 1934, in which you attached thereto copies of three patents, and one of them was the O'Toole

(Testimony of El Roy L. Payne.)

patent, [255] in which you said you did not feel there would be any chance of obtaining any kind of a patent on this pipe.

Q. Have you the letter there that you are referring to? A. Yes.

Q. Is this the letter that you refer to?

A. Yes, this is the letter, here. It is dated April 5.

Q. Of what year?

A. 1934. We received it on April 9, 1934. This is a letter wherein you referred to the three patents and in particular this O'Toole patent, and you state here:

“I was unable to find a double walled pipe in which each wall had a joint independent of the other wall. Both Line and O'Toole bring their walls together to present but one pair of telescoping members at a joint. There is a possibility of securing a patent on your particular joint structure, but only a patent having extremely limited claims. In conclusion, the chance of getting any kind of a patent is doubtful, and a patent that would adequately cover your construction for protection against competition is out of the question.”

So it was based on your letter and recommendation that we did not file any application for any patent.

Q. And at this stage Mr. Stadtfeld had not brought to your attention any official information to the effect that he had at any time previously

(Testimony of El Roy L. Payne.)

filed any application for a patent on any of these structures? A. No.

Q. Was this search I made for you directed as a result of anything Mr. Stadtfeld had done or just as a result of your own curiosity?

A. From nothing he had done, but out of our own curiosity to see whether there was any chance to patent the device, because, as I had written Mr. Stadtfeld previous to that, I did not think there was anything patentable about it, and before we went into the manufacture of it in a large way I just wanted to [256] see whether it was possible to patent the idea.

Q. I note in the correspondence heretofore introduced in evidence that patents are referred to, and in one of these you say that you do not want any lawsuit. What did you have in mind when those letters were written?

A. As I recall that letter, Mr. Connor, it had to do with one of these previous pipes that Stadtfeld had over at the Wayland Manufacturing Company, when he was making up some of these laminated asbestos pipes with that aluminum foil in them, and later on with the cellophane, and he wrote me in one letter that the Plant Rubber Company was threatening suit, and he had gone to his attorney and was sure that they could get claims all right on it, and from that, I, of course, did not want to go into manufacturing that pipe and run up against any pipe litigation, and I wrote him ac-

(Testimony of El Roy L. Payne.)

cordingly, and then later on, of course, he said that the Plant Rubber Company had obtained a patent and more or less indicated that it was a good thing we had not gone ahead, because we undoubtedly would have gotten into a lawsuit with them. I do not remember the exact date of those letters.

Q. Did you have in mind the question of possible infringement when you had this search made you refer to?

A. Will you state that question again?

Q. Will you read it?

The Court: Read the question.

(Question repeated by the reporter.)

A. Yes. Of course, I wanted to make sure that there was nothing already patented which would cause us any trouble, because we like to stay out of litigation.

Mr. Connor: I will offer in evidence the letter referred to by the witness as Defendant's Exhibit 12.

The Court: It will be so received in evidence.

[257]

(The letter of William M. Connor to Payne Furnace & Supply Company was marked "Defendant's Exhibit 12.")

Mr. Connor: Q. Have you completed your testimony regarding all of the conditions and circumstances surrounding your first agreement with Mr. Stadtfeld—your agreement of just compensation and conditions of employment, have you completed

(Testimony of El Roy L. Payne.)

all of that, or is there anything further you want to add to that?

A. You mean in 1934?

Q. Yes, in the early part of 1934 when you were entering upon the manufacture and sale of this particular vent pipe?

A. There is nothing further to say about our employing him and the salary he was to receive.

Q. That salary of \$150 a month was all he was to get and continue that until the business had been established to a point where it was profitable enough to give him more?

A. Yes. Of course, he was to receive any out-of-pocket expense that he might incur.

Q. Now, as I understand, while you started out to advertise this pipe it was some little time before you actually entered into the manufacture and sale of it due to waiting for these tests to be made?

A. Yes, it takes time to get under way, Mr. Connor; in other words, we had to have certain dies made, that embossing die, and then we had to get those tests completed, and accepted, and get various supplies before we could actually sell and install the material.

Q. Did you follow out the arrangement of taking over Mr. Dutton's stock and have the definite understanding regarding his withdrawal from the business, and consent, somebody's consent or understanding that you were to proceed manufactur-

(Testimony of El Roy L. Payne.)

ing this vent pipe under the trade name of Metalbestos? A. I thought we did.

Q. Well, did you take over certain materials from Mr. Dutton? [258]

A. Yes. When Mr. Stadtfeld first wrote us he sent us a list of materials, I think that was in the early part of March, 1934—February 28, 1934—he sent us a list of materials of the plain aluminum pipe and fittings that Mr. Dutton had, and that is when I mentioned before that our San Francisco plant would take over a certain amount of completed stock and the Pittsburgh Water Heater Company would take over the balance. When we finally purchased this plain aluminum pipe and fittings from Mr. Dutton the exact quantity was less than what his previous list was, because they had disposed of some of that in the meantime. So I am satisfied from that that we did buy all of the plain aluminum pipe and fittings at that time.

Q. That was your understanding from the information conveyed to you by Mr. Stadtfeld?

A. Yes. He wrote on March 27 that sales have been made from the plain aluminum stock since the list was first sent you, which accounts for the lower amount of fittings, however they shape up pretty well in proportion to the amount of pipe.

Q. Did anything happen thereafter during the year 1935 that caused you to believe that you had taken over all of Mr. Dutton's stock and that he had given up the business of manufacture and sale of

(Testimony of El Roy L. Payne.)

this vent pipe under the trade name of Metalbestos?

A. It would lead me to believe that inasmuch as he purchased, I think, two or three, possibly, different orders of Metalbestos from us.

Q. Under the trade name of Metalbestos?

A. Yes. He sent his purchase order down to us for a certain number of feet of pipe, and another time he wrote and asked us for a quotation on some very large metalbestos, as I remember it was 16-inch size, and which we quoted him on, but we never did get the order for that. [259]

Q. You did pay Mr. Dutton for the stock of materials that you received from him?

A. Yes.

Q. What particular discussion did you have with Mr. Dutton and what particular reason did you have for wanting to manufacture and sell under the name of Metalbestos?

A. Well, only the fact that it was kind of a good catchy name that he had been using, and of course it was partially established at the time we took it over.

Mr. Owen: I think that question is ambiguous, because it starts out with "What conversation did you have" and then "What particular reason did you have for taking it over."

Mr. Connor: What I meant to say was, what particular discussion did you have with Mr. Stadtfeld relative to the trade name Metalbestos.

(Testimony of El Roy L. Payne.)

A. Only the fact that he had been working with Mr. Dutton here, the name had been established in San Francisco, and they had made a good number of sales around town of the Metalbestos pipe, and I believe had received the approval of the City of San Francisco, and I believe Burlingame, under that name, and it would be only natural that I would prefer to have that name than to go out and start over with some new name.

Q. Would that or would that not have been the case if Mr. Dutton had continued in the business of manufacturing and selling this vent pipe?

A. What was that question?

Q. What I mean is, would you have adopted the name as your trade-mark if there was in your mind any belief that Mr. Dutton was going to continue also in the manufacture and sale?

A. Oh, no, we would have made some other name.

Q. Is there anything more you want to add other than you have stated regarding this period of time that Mr. Stadtfeld was with you, with respect to his work and the services that he proposed to render?

A. Only the fact that Mr. Stadtfeld came to me during [260] his employment, I remember on one occasion on which we discussed the question of his working on a commission basis on the sale of the pipe, and I know we discussed the fact that we could not pay him a commission on the sale of any

(Testimony of El Roy L. Payne.)

pipes made at wholesale other than the territory which would be served in Southern California, because we had our other salesmen out on the balance of the territory, we had to pay them, and naturally could not pay two commissions. At that time, I do not remember the exact date, but I believe it was along about in June, there was no pipe being sold other than what we were selling at retail through our retail department, and I suggested to Mr. Stadtfeld that he had better continue on his \$150 a month until at least the sales would amount to enough where on a commission of 10 per cent. he would get at least that much, and then he would have a chance to make more.

Q. How are sales of this type of article, or articles of a similar nature in our line of business ordinarily made, how are sales promoted? What do you generally have to do to introduce new articles?

A. Of course, you have to advertise in trade papers, and then mail out your bulletins to your mailing list, get publicity, you might say, any way you can, and as the pipe is used both by the heating trade and by the plumbing trade, as well as the utility companies, naturally in fact anybody that is selling vent gas appliances.

Q. Is that ordinarily carried on just by advertising, or are there personal contacts made, I mean in your line of business, the way you handle it?

(Testimony of El Roy L. Payne.)

A. Of course, you can get some orders by direct mail, but it is pretty hard, and particularly the wholesale plumbing trade, you have to call on the jobbers and get them interested; then, again, you have to turn around and work with plumbers to [261] sell them the idea, so that they will, in turn, order it from the jobbers, and it is a long, hard job. A jobber ordinarily does not want to buy it and stock it until the plumbers demand it. So you generally have to make personal contact and create a demand in that way.

Q. Do you contact with architects and builders?

A. Yes, you have to, of course, contact the architects, and get them acquainted with material so that they will specify it in their buildings.

Q. When you entered into this arrangement with Mr. Stadtfeld to take over Mr. Dutton's stock and enter upon the manufacture and sale of this vent pipe, did you understand, from what you had to say and from what Mr. Stadtfeld said that it was to be marketed and sold as your product, as the product of your company? A. Yes.

Q. Other than the arrangement for the payment of salary and the understanding that Mr. Stadtfeld's services were to be directed to promoting the manufacture and sale of the pipe, were there any other conditions attached to it?

A. None other than I previously stated—when the business warranted an increase we would give it

(Testimony of El Roy L. Payne.)

to him. It was also explained, of course, that we had a lot of expense entering into it in the way of starting the manufacture of a new article this way, and we should be given an opportunity to get back some of our investment and at such time we would be glad to increase his salary.

Q. During the period of his employment with you could you actually afford, in so far as returns from the business were concerned, to even pay him \$150 a month? A. No.

Q. Do you figure that during his employment his efforts made in manufacturing and selling this vent pipe returned a profit to your company?

A. Not during his employment, no.

Q. That is, what you put into it was far more than you got out of it? A. Yes. [262]

Q. As I understand now, at the time he entered your employ the 1st of April, 1934, in a sense, you were just starting from scratch on this particular product? A. Yes.

Q. It required new equipment, and new investment, new material, labor, advertising, etc.?

A. Yes.

Q. When did Mr. Stadtfeld leave your employ?

A. The 1st of September, 1934.

Q. What notice did you have of his leaving your employ? A. I had no notice.

Q. Did you talk with him at the time he left your employ? A. Yes.

(Testimony of El Roy L. Payne.)

Q. What was the subject of the conversation, what he said to you and what you said to him?

A. Well, my brother and Mr. Stadtfeld came into my office and my brother said that Stadtfeld was leaving, and as I recall my brother, after exchanging a few remarks, left the room. I then talked to Mr. Stadtfeld. I said, "Well, this is kind of short notice, isn't it, Stadt?" And he said that he had been waiting at home this morning for a special delivery letter that came in and he got it and had to leave at once for San Francisco to take up a new job that he had, which was selling chemicals for a chemical company. I said, "Well, I don't want to hold anyone back, but certainly it leaves me in a bad hole now, after starting this business and just about got to a point where we could start getting some return from it you up and leave me." "Well," he said, "I am going to work for this chemical company, and I will be coming down here about once a month and if I can help you I will be glad to do so." In the course of the conversation, I don't remember just where it took place, he told me he was not able to get along on the amount of money that I was paying him. I said, "Well, it is too bad we did not figure that out before we got into this mess," or something like that. And then, of course, he said [263] his wife had moved up to San Francisco, she had gone back up there about six weeks before, and he wanted to get back to his wife and family, etc.

(Testimony of El Roy L. Payne.)

Q. Did he give any reason why his family had gone back up to San Francisco?

A. Well, we had, of course, discussed that at the time she went back. I knew that he took her back to San Francisco, in the middle of July, I think it was July 19th that he brought them back up to San Francisco. He came into my office, I think about two or three days before that time, and said that his wife was dissatisfied in Los Angeles and wanted to come back to San Francisco, and he asked permission to use the automobile that he was using, which was one of these panel delivery cars, to bring his wife and family and trunks, suitcases, etc., up here, that he could not afford to send them up on the train. Our company has a policy of not allowing employees to use cars for personal use that way, but I did make arrangements with Mr. Stadtfeld to use the cars, and he would pay his own gasoline and oil and pay the company 2 cents a mile for normal wear on the tires, etc.

Q. Now, at any time during the course of his employment did Mr. Stadtfeld have any conversation with you in which he accused you of not properly living up to your agreement that you had entered into with him?

A. No, I did not know he was what you might term dissatisfied until the day he quit; he had mentioned to me it was hard to get along on \$150 a month, but other than that there was no discussion.

(Testimony of El Roy L. Payne.)

Q. The first notice you had he was going to quit was the day he came in and quit? A. Yes.

Q. Had anything occurred before that time which raised any question with you with regard to his employment, that is, had his relations been agreeable to him except that he wanted more money? [264]

A. His relations had been absolutely all right.

Q. Did Mr. Stadtfeld ever return to Los Angeles after he left at that time, which I understand was around the 1st of September, 1934?

A. Not to my knowledge.

Q. At any time during this period of employment, either prior to it or during it, or after it, did Mr. Stadtfeld ever demand that you pay him a royalty for manufacturing this pipe and selling it?

A. No.

Q. Did he ever at any time in conversation with you, either prior to or during or after he started on the manufacture of this vent pipe, ask anything other than the salary and an opportunity to work with you and sell this vent pipe?

A. That was all, except when we discussed his working on a commission basis.

Q. Since you commenced to manufacture and sell this vent pipe under the name Metalbestos has Mr. Stadtfeld ever demanded that you stop the manufacture and sale of the vent pipe?

A. No.

(Testimony of El Roy L. Payne.)

Q. He has not demanded a royalty at any time?

A. No.

Q. During any period of time other than these references in these early letters to having filed application for patent, did he ever tell you that he had filed any application for patent on this particular pipe known in your case as Payne-A and in plaintiff's case as Metalbestos?

A. Only as referred to in these letters, and explaining that he had merely filed a drawing and discussed it with some local attorney, but that patent had never been filed, and he even one time suggested that we have our attorney file an application for him.

Q. As I understand, you received this letter from him regarding the possible patentability of this vent pipe about April 7, and I believe the correspondence shows that Mr. Stadtfeld reached Los Angeles some place around about May 4, did he not? A. Yes. [265]

Q. Did you ever give that letter of mine to Mr. Stadtfeld to read? A. Yes.

Q. You discussed the matter with him?

A. Yes.

Q. Was anything further discussed about patentability after that?

A. Well, at the time I showed him your letter and those references I said that certainly was a recommendation for Mr. Connor, knowing how busi-

(Testimony of El Roy L. Payne.)

ness was at that time, that I certainly did not believe Mr. Connor would turn down the opportunity of filing an application which meant a probability of \$150 for him if there was any chance of obtaining a patent, and I said "Certainly, under the circumstances, Mr. Stadtfeld, I would not want to waste my money."

Q. Did you, in connection with the manufacture and sale of this vent pipe, use the name "Metalbestos"?

A. Did we use the name?

Q. Metalbestos. A. Yes.

Q. Did you, during the period during which Mr. Stadtfeld was in your employ? A. Yes.

Q. Did you do certain advertising in which that name was used? A. Yes.

Q. Did you have that trade mark registered in the State of California? A. We did.

Mr. Connor: Q. When did you first learn that the plaintiff was selling a similar vent pipe under the trade name of Metalbestos?

A. As I recall it, the first time it was brought to my attention was [266] in the early part of October, 1934.

Q. Who brought it to your attention?

A. Well, I got it all about the same time from several different sources. I think Mr. Fleming, here in San Francisco, wrote me a letter about it, and I received another letter from our salesman in

(Testimony of El Roy L. Payne.)

Dallas, Texas, in which he returned a bulletin that had been sent out by the Williams Wallace Company, to one of the gas companies to whom we were selling.

Q. That is a bulletin announcing the plaintiff's use of the name and the manufacture and sale of the pipe under the name of Metalbestos?

A. Yes. I received another letter from one of our other salesmen, Mr. Fisher, who had also picked up one of these circulars.

Q. And you say that was sometime during October, 1934?

A. Either the latter part of September or the early part of October, I think.

Q. Had Mr. Stadtfeld at any time prior to or during or after his period of employment with you intimate in any way whatsoever that he was going to or had in mind any arrangement with the plaintiff in this case for the manufacture and sale of this Metalbestos vent pipe? A. No.

Q. Mr. Stadtfeld's representation when he left your employ was that he was going to work for someone other than the plaintiff? A. Yes.

Q. The plaintiff is not a chemical concern, is it?

A. Not that I know of.

Q. It is really not a gas heating and appliance manufacturer, is it?

A. I believe their business is confined to the manufacture of sheet metal products and specialties.

(Testimony of El Roy L. Payne.)

Q. That is outside of the field of gas heating appliances and [267] equipment? A. Yes.

Q. How long did you continue to use the trademark "Metalbestos" after Mr. Stadtfeld left your employ?

A. We continued using it for quite some time. I believe it was along in about July or August, 1935, when we discontinued the use of the name.

Q. During that period of time you had the stamp embossed name on the outer shell, did you not? A. Yes.

Q. Why did you change and adopt this spiral Payne-A-Vent which you continued to use after that period of time?

A. We changed the name and started to use that for two reasons, and one of them was the fact that the stamp embossed name "Metalbestos" would just show in one place on the pipe, and on the installation in buildings it could be turned against the wall where it could not be seen, and the people of the Building Department of Los Angeles had caught a couple of plumbers, also in Pasadena they caught a couple of fellows putting in plain galvanized pipe, so it was Mr. Wicks' recommendation that we mark it spirally, so that regardless of where it was and no matter where it would be turned, you could always see the spiral mark. Also, at that time we were obtaining the approval from the Underwriters' Laboratory, and we felt it would be a

(Testimony of El Roy L. Payne.)

good chance to change the name, so that we would have the approval come out under the name Payne-A-Vent, and we changed the advertising, etc., accordingly, so that we would not have to have it done over again.

Q. Did the fact that the plaintiff commenced to use the same trade-mark have anything to do with making the change?

A. Yes, of course, it caused us to change it. We were doing a great deal of advertising of our article, and they were using the same name in selling their product, and we knew in a number of cases they made sales where people thought they were actually buying our pipe. [268]

Q. Was it also due to the fact that you did not want any litigation about it? A. Yes.

Q. You did not want to go to the expense of litigation? A. No.

The Court: We will take an adjournment in this case now until tomorrow morning at ten o'clock.

(An adjournment was here taken until tomorrow, Friday, March 4, 1938, at ten o'clock a.m.) [269]

Friday, March 4, 1938.

EL ROY L. PAYNE,

Direct Examination

resumed.

Mr. Connor: Q. Mr. Payne, during the period from the first part of April, 1934, until Mr. Stadt-

(Testimony of El Roy L. Payne.)

feld left employment with your company did you do any advertising of Metalbestos vent pipe?

A. Yes.

Q. I show you a magazine, "Western Gas". Did you advertise in these magazines?

A. Yes.

Q. Will you just refer to the volume, that is, to the issue and the page number?

A. June, 1934, we advertised a full page on page 45 of the "Western Gas."

Q. When you identify these, you mean you received these copies and you know they were published on those dates?

A. That is the month they were distributed in; they were actually printed before that.

Q. They were received by you and you know they were published on that date? A. Yes.

Q. I have another one marked here. What does that mean?

A. It is a little publicity item announcing we were starting to manufacture this material, where they gave publicity for new materials on the market.

Mr. Connor: I offer page 45 of the issue of the "Western Gas" of June, 1934, in evidence as Defendant's Exhibit 14-A.

The Court: So received.

(The document was marked "Defendant's Exhibit 14-A.")

(Testimony of El Roy L. Payne.)

Mr. Connor: On page 40 of the same publication under the item "Payne Furnace announces Metalbestos vent pipe", as Defendant's next exhibit.

The Court: Those two articles will constitute Exhibit 14-A. [275]

Mr. Connor: Q. And the next one?

A. August, 1934 issue, in which we had an advertisement on page 40, advertising Metalbestos.

Mr. Connor: I will offer page 40 of the issue of "Western Gas" of August, 1934, as Defendant's Exhibit 14-B.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 14-B.")

Mr. Connor: Q. What is the next one?

A. September issue, 1934, an ad on page 55.

Mr. Connor: I will offer page 55 of the issue of the "Western Gas" of September, 1934 as Defendant's Exhibit 14-C.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 14-C.")

Mr. Connor: Q. The next one?

A. December, 1934, page 40 advertising Metalbestos.

Mr. Connor: I will offer page 40 of the issue of "Western Gas" of December, 1934 as Defendant's Exhibit 14-D.

(Testimony of El Roy L. Payne.)

The Court: So received.

(The document was marked "Defendant's Exhibit 14-D.")

Mr. Connor: Q. The next one?

A. January, 1935, page 40, advertising Metalbestos.

Mr. Connor: I will offer page 40 of the issue of the "Western Gas" of January, 1935, as Defendant's Exhibit 14-E.

The Court: So received.

(The document was marked "Defendant's Exhibit 14-E.")

Mr. Connor: Q. The next one?

A. March, 1935, page 48, advertising Metalbestos.

Mr. Connor: I will offer page 48 of the issue of "Western Gas" of March, 1935, as Defendant's Exhibit 14-F.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 14-F.") [276]

Mr. Connor: Q. The next one?

A. April, 1935, page 48.

Mr. Connor: I will offer page 48 of the "Western Gas" issue for April, 1935, as Defendant's Exhibit 14-G.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 14-G.")

(Testimony of El Roy L. Payne.)

Mr. Connor: Q. Now, were there any other publications that you advertised in during that space of time?

A. Yes, Pacific Coast Building Officials Conference—I believe it is termed the Pacific Conference Bulletin.

Q. What territory, to your knowledge, does the distribution of this Western Gas Magazine cover?

A. Well, it is a national trade magazine, it covers the entire United States.

Q. In the various localities where gas is used, I mean gas appliances are used? A. Yes.

Q. How is its standing as a trade publication?

A. As I understand, "Western Gas" has a larger circulation than similar gas magazines.

Q. Now, proceed. This is a Pacific Coast Conference Bulletin you are referring to now?

A. Yes.

Q. Where is it published?

A. It is published, I believe, in Los Angeles, that is the headquarters.

Q. What territory does that publication cover?

A. They have a membership, I believe, of around three to four hundred in various cities, most of them on the Pacific Coast of the Western States.

Q. Now, proceed with the publication?

A. This is August, 1934, page 7, advertising Metalbestos.

(Testimony of El Roy L. Payne.)

Mr. Connor: I will offer page 7 of the issue of August, 1934 of the Conference Bulletin in evidence as Defendant's Exhibit 15-A.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 15-A.") [277]

A. September, 1934, page 15, advertising Metalbestos.

Mr. Connor: I will offer page 15 of the issue of the Conference Bulletin of September, 1934 in evidence as Defendant's Exhibit 15-B.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 15-B.")

A. The next one is October, 1934, page 15.

Mr. Connor: I will offer in evidence page 15 of the Conference Bulletin issue of October, 1934, as Defendant's Exhibit 15-C.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-C.")

A. The next one is combined November and December issue, page 9.

Mr. Connor: I will offer page 9 of the issue of November-December of 1934 of the Conference Bulletin in evidence as Defendant's Exhibit 15-D.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-D.")

(Testimony of El Roy L. Payne.)

A. The next one is the combined issue of January and February, page 10.

Mr. Connor: I will offer in evidence page 10 of the Conference Bulletin issue of January-February, 1935, as Defendant's Exhibit 15-E.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-E.")

A. The next one is March and April, 1935, page 9.

Mr. Connor: I will offer in evidence page 9 of the Conference Bulletin, issue of March-April, 1935, as Defendant's Exhibit 15-F.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 15-F.")

A. The next is May, 1935, page 14.

Mr. Connor: I will offer page 14 of the Conference Bulletin, [278] issue of May, 1935, as Defendant's Exhibit 15-G.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-G.")

A. The next is June, 1935, page 12.

Mr. Connor: I offer in evidence page 12 of the Conference Bulletin, issue of June, 1935, as Defendant's Exhibit 15-H.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-H.")

(Testimony of El Roy L. Payne.)

A. The next is July, 1935, page 12 also.

Mr. Connor: I will offer page 12 of the Conference Bulletin issue of July, 1935, as Defendant's Exhibit 15-I.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-I.")

A. The next one is August, 1935, page 12 also.

Mr. Connor: I offer page 12 of the Conference Bulletin issue of August, 1935, as Defendant's Exhibit 15-J.

The Court: So received.

(The document was marked "Defendant's Exhibit 15-J.")

Mr. Connor: Q. Were these various publications last referred to of the Conference Bulletin published at those times, or during those months, to your knowledge? A. Yes.

Q. Now, what other advertising did you do during that period from the 1st of April, we will say, through 1934?

A. We printed a Metalbestos bulletin, four-page bulletin, and I forget the exact quantity, I think something like six or eight thousand of them during that period, and they were mailed out to our mailing list of architects, builders, or registered plumbers.

Q. I will hand you a bulletin and ask you if that is the one you are referring to. A. Yes.

(Testimony of El Roy L. Payne.)

Q. How many of these did you have printed and sent out during [279] that period of time—these invoices refer to the dates and the numbers, there; will you refer to the invoices?

A. We received the invoice for the first two thousand dated May 7, 1934, the next was an invoice for 1000 July 9, 1934; August 2, 1934, an additional 1000; October 1, 1934 2000; March 14, 1935 1000; July 12, 1935, 500; August 24, 1935 500.

Q. Were all of those distributed or mailed out during this period of time? A. Yes.

Q. That is, you would use your first printing before you would order another one?

A. Well, practically so, when we got low naturally we would place an order for the next bunch.

Mr. Connor: I will offer the Metalbestos Bulletin, together with the invoices attached for the printing, which the witness has referred to, as Defendant's Exhibit 16.

The Court: So ordered.

(The document was marked "Defendant's Exhibit 16.")

Mr. Connor: Q. To whom were bulletins of that type sent?

A. We have a mailing list of utility companies, jobbers and dealers to which we sent these bulletins.

Q. Extending over what area—the entire United States?

(Testimony of El Roy L. Payne.)

A. Yes, over the entire United States.

Q. And were those bulletins sent from time to time to those various people? A. Yes.

Q. I will hand you another paper. Will you state what that is?

A. It is a list of architects and engineers through the Pacific Coast area—I will correct myself; I say “Pacific Coast area”, it is Southern California area. It is called a Catalog Filing Company to which we furnished 291 of these bulletins, and they were personally filed by the Catalog Filing Company into the engineers’ and architects’ files of their office. [280]

Q. These Metalbestos Bulletins attached are the ones that they filed? A. Yes.

Mr. Connor: I offer the list just referred to by the witness as Defendant’s Exhibit 17.

The Court: So ordered.

(The document was marked “Defendant’s Exhibit 17.”)

Mr. Connor: Q. Now, what other advertising, if any, did you do of Metalbestos vent pipe during that period?

A. Well, no other advertising other than what I have referred to, except mailing these out to these architects.

Q. What did you mail out?

A. We mailed this letter out dated June 26, 1936, in which we enclosed a copy of the Metalbes-

(Testimony of El Roy L. Payne.)

tos Bulletin, and that was sent to our mailing list here, which comprised what we term 83 franchise dealers.

Q. What is a franchise dealer?

A. A franchise dealer is a Payne Furnace dealer that sells Payne furnaces exclusively. 432 ordinary dealers. An ordinary dealer is one that does not sell Payne furnaces exclusively, but sells Payne furnaces and all other makes, 273 utility companies, and 22 jobbers, jobbers being the wholesale plumbing jobbers.

Q. That is dated June 26, 1934? A. Yes.

Q. They were mailed out shortly after that date?

A. They were sent right in the same envelope with this letter.

Q. Did you have more than one issue of that letter? What have you there?

A. This other letter is August 1, 1934. This was a letter that was sent to all the licensed retail plumbers in the Southern California area.

Q. Under date of August 1, 1934?

A. Yes. I don't know how many were mailed. There is no notation made on here as to the quantity. Then on December 31, 1934, at the request of Mr. Carl Privett, who [281] was commercial manager of the Lone Star Gas Company, at Dallas, Texas, we sent a bulletin to each of these district offices, numbering 44 along with this letter of December 31, 1934. This isn't the correct letter that

(Testimony of El Roy L. Payne.)

went along with that first list, Mr. Connor. You have another letter.

Q. I have one here dated May 15, 1934. Is that the one you are referring to?

A. That is the one I referred to. That was sent out to them.

Q. Franchise dealers, utility companies, jobbers and special? A. Yes.

Q. That was the first one dated May 15, 1934, that was sent out?

A. Yes. The letter of June 26th merely mentioned Metalbestos in the letter, we called their attention to it, we got a double shot at them in that way.

Q. You mean that sentence at the bottom, "Our New Metalbestos vent pipe is going over in a big way"?

A. Yes.

Q. That is the letter of May 15, 1934 was sent out in numbers to the franchise dealers, the utility companies, jobbers and special, noted on the letter of June 26, 1934?

A. That is correct.

Q. But the one of May 15 was the original Metalbestos letter?

A. That is when the original Metalbestos first bulletin was mailed out to that mailing list.

Q. And those of June 26, 1934 were follow-up letters? A. Yes.

(Testimony of El Roy L. Payne.)

Q. As I understand, these letters were accompanied by one of the bulletins previously referred to as Metalbestos bulletins?

A. Well, except with the letter of June 26th there was not any Metalbestos bulletin sent with that. It was just merely mentioned in the letter to draw it to their attention.

Q. What are these notations in red on the bottom of these letters, the letter of May 15? What does that mean?

A. Well, the same [282] letter was sent out to the three classifications with the exception of the red on the bottom; the red type on the bottom was calling their attention to their discount from the listed prices on the back of the Metalbestos Bulletin, because the dealers did not get a discount and the utilities and jobbers did get a discount from the published price.

Mr. Connor: I will offer the letters just referred to by the witness in a group as Defendant's Exhibit 18.

The Court: So ordered.

(The group of letters was marked "Defendant's Exhibit 18.")

Mr. Connor: I suppose it would be agreeable to counsel and the court if we just cut these pages and marked them as exhibits, so the file would not be incumbered with them.

(Testimony of El Roy L. Payne.)

The Court: If you will authorize the clerk to do so he can cut those pages from the magazines.

Mr. Owen: That will be perfectly agreeable. We will authorize the Clerk to remove those pages.

The Court: With that understanding the Court will instruct the Clerk, when the opportunity presents itself, to make those modifications.

Mr. Connor: Q. Did you do anything else in connection with the promotion of the sale of Metalbestos during that period of time?

A. We received a number of letters, of course, in response to our mailing, and so we made up a number of samples and sent those to the people so that they could actually see the construction of the pipe, itself.

Q. I will hand you what appears to be a sample. Is that the one you refer to?

A. Yes, these are the samples that we made up in quite a large quantity, I do not remember exactly the exact number that we made up, but we did send out a great many of these [283] in response to inquiries we received. In fact, under date here of the 1st of May, or thereabouts, up until about November—

Q. What year?

A. 1934—we sent out 17 from this list.

Q. 17 samples? A. 17 samples.

Q. What does the list represent?

(Testimony of El Roy L. Payne.)

A. Those are the sales that we made on a whole-sale basis of Metalbestos from the time we started up until November 17, 1934.

Q. And that list was compiled from the records of your company? A. Yes.

Q. Sales slips, etc.?

A. They are made up from our invoices. These include the customer's name and address, and our invoice number and the date of shipment.

Q. And the Xs there mean what?

A. That means where samples were sent.

Mr. Connor: I will offer the sample referred to by the witness in evidence as Defendant's Exhibit 19.

The Court: So received.

(The sample was marked "Defendant's Exhibit 19.")

Mr. Connor: We offer the list referred to by the witness as Defendant's Exhibit 20.

The Court: So received.

(The document was marked "Defendant's Exhibit 20.")

Mr. Connor: These dates over on the side of Exhibit 19 are the dates on which sales were made and this list is of the invoice number?

A. Yes.

Q. Can you give an idea in general figures of about how much money your company expended on the manufacture and sale and advertising of Metal-

(Testimony of El Roy L. Payne.)

bestos vent pipe during that period from the first part of April to the end of 1934, or thereabouts?

A. Well, I compiled, Mr. Connor, from the time we started up until September 1, and we expended approximately \$3800 in the way of dies and benches and [284] bends—

Q. Have you the list compiled there?

A. I have just an idea that I made up, in other words, the tools and machinery and benches \$594, rent for property on Robertson Boulevard for three months, \$40 a month, \$120, and I estimated the water, light and gas about \$18. Salary and expenses of Mr. Stadtfeld during that period \$412.28—pardon me, this \$412.28, I include in this, because that is money we paid to Mr. Stadtfeld in May and June, 1932 which we have included in our investment in getting into the vent pipe business; salary to Mr. Stadtfeld from March 26, 1934 to September 1, 1934, \$784.10, and then salary to Laurel Bogue, who was the man who was assisting Mr. Stadtfeld in this new plant where we started up, \$450, and Mr. Stadtfeld had the use of my automobile while he was with us, and while I did not have the exact number of miles I estimated it at approximately 30 miles per day for that, which would be \$270, based on 6 cents per mile. Expense of laboratory of having material tested and approved, \$250, and advertising in Western Gas, in Plumber's Magazine and Pacific Coast Bulletin, and the bulletin

(Testimony of El Roy L. Payne.)

that we had printed, and mailing, etc., \$898. The samples that are referred to in this exhibit here at approximately \$10 cost of manufacture and mailing and shipping them out makes a total approximately of \$3800. Now, of course, this does not include any time of our wholesale salesmen that were promoting this activity all the time, but their time being divided between the Metalbestos business and the Payne Furnace business it would be awfully hard to estimate it, and then a normal overhead expense of doing business, such as correspondence and clerical business—you could easily arrive at an estimated figure of \$5000 that we had put into the business up to September 1, which does not include any materials, or anything of that kind, but just the expense of getting started in the [285] business.

Q. Are those figures you gave us taken from your records, invoices that you have, etc.?

A. The figures for the tools and machinery and the advertising expenses, and salaries, etc., are taken from the records. I estimated the light, water and gas. I did not dig into the files on those small items.

Q. Are these items here listed on these invoices of Poulsen & Narden included in the figures that you have just given? A. Yes.

Q. About when did you get under way with the manufacture on your own account, turning it out in your own plant?

(Testimony of El Roy L. Payne.)

A. Well, we purchased the aluminum, etc., from the Standard Asbestos, what they had left, and we completed that, and started—it was along in the first part of July before we received the first initial shipment of aluminum from the Aluminum Company of America, so we could get in production in any quantity.

Q. Regarding this purchase of vent pipe from Mr. Dutton, about how many feet would that approximately be?

A. I think something like 4000 feet of sizes maybe 3, 4, 5, and 6 inches.

Q. That was sufficient to get started on in your advertising, etc.?

A. Yes.

Q. When did you say you received the first shipment of aluminum from the Aluminum Company of America?

A. The shipment was made from the Aluminum Company of America on June 16th and was routed via Philadelphia by water, and I don't know exactly what day we did actually receive that aluminum, but we know the ship's schedule is about 17 days in to Los Angeles Harbor, and then delivering it up to our plant in Beverly Hills, it would establish the date around the early part of July, anywhere between the 4th and 10th, provided the steamship was on schedule. This is the invoice for the first shipment that we received from the Aluminum Company [286] of America.

(Testimony of El Roy L. Payne.)

Q. Do you know approximately how many feet of pipe this quantity of aluminum would make up?

A. No, I don't know what that would make without arriving at the quantity, because each size of pipe and each size of fitting has to have a certain size of aluminum so as to be cut without waste, and we take our past purchases of Vitex and arrive at the quantity on that basis. Of course, we had to buy sufficient poundage or tonnage there to get the best price, and on our first order we just bought enough to get the lowest possible price, and in quantities to make up the various sizes. I have never gone into how many feet or fittings of pipe that would perhaps make.

Q. It would make up quite a quantity of pipe, though? A. Yes.

Mr. Connor: I will offer the papers referred to by the witness as "Defendant's Exhibit 21."

(The documents were marked "Defendant's Exhibit 21.")

Q. I show you a section of vent pipe and ask you if you know what that is. A. Yes.

Q. What is that?

A. It is a piece of pipe I had made in our plant in accordance with the O'Toole patent.

Q. It was made from the teachings of the O'Toole patent that is in evidence here?

A. Yes.

Q. That is the O'Toole patent which is No. 878,-014 in evidence as Defendant's Exhibit 4-E?

(Testimony of El Roy L. Payne.)

A. Yes.

Mr. Connor: We will offer this section of pipe in evidence as Defendant's Exhibit 22.

The Court: So received.

(The piece of pipe was marked "Defendant's Exhibit 22.")

Mr. Connor: Do you want to look at that?

Mr. Owen: I object to it on the basis that it is not a correct [287] model. I will bring that out in testimony.

Mr. Connor: I will offer in evidence as Defendant's Exhibit 23 a section of vent pipe which counsel for plaintiff stipulates is the vent pipe manufactured and sold by the plaintiff.

Mr. Owen: That stipulation, your Honor, goes for the construction of the pipe. There is one thing about it which is not our current practice, and that is this has a wrong patent number on it. We discovered that the wrong number was being put on our pipe, so that the present pipe carries the patent number under which it is being made. It is otherwise a correct representation of our pipe.

The Court: Formerly you did get it out in that way?

Mr. Owen: Yes. We discovered they were putting this number on when we changed over to the new form.

The Court: In other words, when you discovered the patent number was incorrect you put the correct number on it?

(Testimony of El Roy L. Payne.)

Mr. Owen: Yes.

Mr. Connor: As I understand, this number that is on this section of pipe is the number of the patent in suit.

Mr. Owen: Yes. We do not claim the patent in suit covers this pipe.

Mr. Connor: When did you make that change, Counsel?

Mr. Owen: This number was taken off as soon as it came to my attention that we were marking this pipe with that patent number.

Mr. Connor: You did for a long period of time, though, mark pipe like this section introduced in evidence here with the number of the patent in suit, didn't you?

Mr. Owen: I don't know how long a time it was, but when it was discovered it was corrected, because it is not the correct patent number for this pipe. [288]

Mr. Connor: Can you supply us with a section of vent pipe which has on it the number of the patent in suit?

Mr. Owen: I have here in the court-room this model which I intend to introduce as an exhibit, which is the pipe we make under the patent in suit, and it is so marked, and that is going in as an exhibit.

Mr. Connor: As I understand, it was not offered on the prima facie case.

(Testimony of El Roy L. Payne.)

The Court It is not offered yet.

Mr. Owen: It will be offered in rebuttal, or it can be offered now. Will you stipulate that is the pipe we make under the patent in suit?

Mr. Connor: I won't object to the introduction in evidence, your Honor, of one section of their pipe which is only that which is covered by the patent in suit. I will object to the introduction in evidence of all the rest of the exhibit as being irrelevant and immaterial to the issues of this case.

Mr. Owen: The reason why we want to introduce the two sections and the top is to be able to show that one of the inventive features of this patent in suit is in the assembly of the device, so that it requires more than one section to get a correct picture of the outward environment and the actual operation of the invention. For that reason I want to offer both sections that are in that exhibit, together with the part at the bottom and the top.

The Court: Of course, if he offers that in evidence you will have the portion you want.

Mr. Connor: I will take the portion I want, but I think the rest is entirely immaterial.

The Court: You have not offered that in evidence yet as 22? [289]

Mr. Connor: I have offered it but I will withdraw my offer if counsel is going to introduce a section of this.

(Testimony of El Roy L. Payne.)

The Court: You offer that as Plaintiff's Exhibit No. 4, then?

Mr. Owen: Yes, as Plaintiff's Exhibit No. 4. I might note on the record that that Exhibit 4 comprises a base, a key, a thimble, two sections of pipe made according to the patent in suit, and a top, together with two clamps supporting the pipe in a vertical position on the stand.

(The device is marked "Plaintiff's Exhibit 4.")

[290]

Mr. Connor: Now an issue in this case is in the claim that this vent pipe is made up of an inner and outer pipe spaced from each other by asbestos and that the inner pipe is slidable relative to the outer tube. I will ask you if such a structure could be made and put together without sliding, one relative to the other, according to your knowledge and experience?

Mr. Owen: Before the witness answers, are you asking him to construe the claim?

Mr. Connor: I was not quoting the claim.

Mr. Owen: The claim has much more to it than that.

Mr. Connor: It is not the intention to construe the claim.

A. Why, to my knowledge of the sheet metal business, I cannot conceive how it could possibly be made otherwise.

(Testimony of El Roy L. Payne.)

Q. From your years of experience in installing vent pipes like that referred to as Exhibit G attached to the deposition, were or were not those pipes made so that the inner tube would be slidable [291] with respect to the outer tube?

A. Which is Exhibit G?

Q. This vent pipe taken out of Mr. Baker's residence, that you have examined.

A. That is the way the pipe was first made up and rolled up and the space attached to it—that is at least the way we always made it; we attached the space to the inner pipe and slid it inside of the outer pipe.

Q. Would it or would it not be impossible to make a vent pipe without sliding it together?

A. It is awfully hard to conceive how it could be done without making them two pipes and sliding them in; I could not conceive of any machinery that could roll two pipes at the same time and be able to seam the inner pipe; it would be very nearly impossible. I could not conceive of any way that could be done.

Q. It would be impossible to make an inner pipe wrapped with asbestos and then form an outer pipe upon that, join the seam around with asbestos without first joining the seams and sliding them together—it would not be possible to form an outer pipe on an inner pipe covered with asbestos?

(Testimony of El Roy L. Payne.)

A. I would not say it would be impossible, but it certainly would be impracticable.

Q. Now, with reference to the joining together of these pipes—you heard counsel's opening statement regarding the joining of more than one section of this pipe, that is, the convenience of it and the purpose of it, that is in first pulling down the inner section, the aluminum section, and joining that to the next inner aluminum section, and thereafter sliding the outer section down upon the top of the next lower outer section, forming—I forget the term counsel used—but anyway a joint to shed moisture. Now, to your knowledge have joints like that been made before? A. Yes.

Q. Is that manner of forming joints in this particular arrangement [292] to your knowledge?

A. Well, it is always customary, even, of course, in putting up downspouts, that the metal in the pipe always goes to the inside to carry the water, or whatever it may be, a warm air pipe with the flow of the air—it is common practice, just like you put, you might say, siding on a house to shed water.

Q. In other words, a tin roof, or anything like that? A. Yes.

Q. In this instance a joint is made of the fact that the female end of the pipe is at the lower end—the female end of the outer pipe is at the lower end and opposite the male end of the inner pipe. Do you know what that is for, the purpose of that?

(Testimony of El Roy L. Payne.)

A. Well, that is on the inner pipe for the reason that the female end comes up so that the male end can enter the female end and divert the condensate that may accumulate on the inside of the pipe down to the bottom so that it cannot go through the joint and get to the insulating material. On the outer pipe, then, you do just the opposite to divert the rain or any moisture that might form on the outside and divert it to the outside of the pipe, so that it cannot get into the air cell space, get at the asbestos material.

Q. I will show you Bulletin No. 302, and ask you if you will state what that is.

A. That is a bulletin taken from our Sales & Service Manual which we printed and passed out to our dealers, to assist them in the proper installation of gas vents. The balance of the bulletin, of course, dealt with other problems on heating. This bulletin was printed on March 30, 1932.

Q. That is, you are referring now to the date on the back of it—3/30/32? A. Yes.

Q. It was a publication that your company had printed, published and distributed at that time?

A. Yes.

Q. Whom did you say these bulletins were distributed to? [293]

A. These were sent out to all of our dealers and agents to assist them in putting in vents properly.

Q. Can you find any reference in this bulletin to structures similar to those under consideration, and, if you can, state what page it is on.

(Testimony of El Roy L. Payne.)

A. On page 2 of Bulletin 302 we state there under "Installing a new vent" that "The female end of each section must look UP and all joins must be sealed with a rich cement mortar for terra cotta or special cement for asbestos pipe which is usually furnished with the vent pipe and fittings by the manufacturer."

Q. Just a minute, Mr. Payne. What is meant there by the female end of each section must look up?

A. That is, the large end of the pipe must look up so that the small end can come down inside of that to divert the condensate inside.

Q. You mean the upper end of the inner pipe is at the top end of the section, so that the lower end of the next higher section will fit inside of the inner pipe of the next lower section?

A. Yes. On page 4 of the same bulletin is stated: "Vent pipe must be encased in a metal or other satisfactory housing with one-inch intervening dead air space all around the vent. This method of casing keeps the cold air from impinging on the vent. By closing the openings at the top and bottom, a sealed dead air space is provided which prevents circulating currents of air from reducing the stack temperature by convection."

Q. Who prepared that bulletin, or assisted in the preparation?

(Testimony of El Roy L. Payne.)

A. It was prepared under my supervision by a former employee of mine, Mr. J. Lyne Vance.

Mr. Connor: I will offer in evidence the bulletin referred to by the witness as Defendant's Exhibit 24.

(The document was marked "Defendant's Exhibit 24.") [294]

Mr. Connor: Q. What, in your opinion—I won't say in your opinion, but from your experience in the manufacture and sale of vent pipes like your Payne-A-Vent that is here under consideration, what is the essential selling point of it? What is there about the pipe that causes it to become a salable article in the gas vent field?

A. It is the ability of the aluminosity to withstand the corrosive action of acids and gases.

Q. Is there anything about the particular construction, that is, the inner and outer tube, and the lining between, that has anything to do with affecting its sale, or the fact that an inner tube may be slidable with reference to an outer tube? Do you find that that has anything to do with the sale over the value of what aluminum pipe has as a corrosive resistant tube?

A. Well, no, because there has been in years past pipes made of the same construction, an inner and outer tube, but the old method was using this galvanized inside, which it would break down in time from the attack of acid on the iron, and gen-

(Testimony of El Roy L. Payne.)

erating an iron sulphate, which would scale off and close the pipe off; so it was merely carrying out the old method, but by using the inner pipe of aluminum, you might say, which we after our exhaustive tests proved to withstand these acid conditions——

Q. I understand now the Payne-A-Vent has been approved by the Building Department of the City of Los Angeles: that is correct, is it not?

A. Yes. [295]

Mr. Connor: Q. When you apply for and obtain an approval of an article of that kind, you make your application for it and you are advised whether it is approved and why, you are told if it is approved why and if it is not approved you are told why it is not approved, are you not?

A. Yes.

Q. The next question is, is the fact that the inner tube in this pipe is made of aluminum taken into consideration and communicated to you by the authorities in approving or disapproving your vent pipe? A. Yes.

Q. Isn't it a fact that for years ordinances specified terra cotta and cement pipes for the purpose of resisting corrosion? A. Yes.

Mr. Connor: You may cross examine.

Cross Examination

Mr. Owen: Q. There was introduced this morning at Exhibit 16 a metalbestos bulletin, and I hand you another bulletin called Payne-A-Gas Vent

(Testimony of El Roy L. Payne.)

and Flue Pipe, and ask you if that was also put out by your company?

A. Yes, this is now put out in place of Metalbestos.

Mr. Owen: I offer it in evidence as Plaintiff's Exhibit 5, the bulletin just shown to the witness.

The Court: It will be so received.

(The document was marked "Plaintiff's Exhibit 5.")

Mr. Owen: It is dated on the back February, 1936.

Q. I also show you a copy of the publication of Gas of September, 1936, page 65, and ask you if that is an advertisement of your company.

A. Yes. [297]

Q. Of this Payne-A-Vent? A. Yes.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 6 page 65 of September, 1936, issue of "Gas." I understand the Clerk will also tear this page from the magazine.

The Court: So received.

(The document was marked "Plaintiff's Exhibit 6.")

Mr. Owen: Q. I hand you July, 1937, issue of "Gas", page 34, is that an advertisement of your company? A. Yes.

Q. Of your Payne-A-Vent? A. Yes.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 7 page 34 of "Gas" dated July, 1937.

The Court: It will be received.

(Testimony of El Roy L. Payne.)

(The document was marked "Plaintiff's Exhibit 7.")

Mr. Owen: Q. Those two advertisements which I have just shown you are typical of the advertising done since you dropped the name Metalbestos, are they not? A. Yes.

Q. I hand you a letter on the letterhead of Payne Furnace & Supply Company, dated May 20, 1935, with the initials in the lower corner of "E. L. P." Is that a letter that you dictated?

A. Yes.

Q. The purport of this letter is that you are relinquishing the use of the trade-mark "Metalbestos" to the plaintiff company, is that correct?

A. That is correct.

Mr. Owen: I offer in evidence the letter just shown the witness as Plaintiff's Exhibit 8.

The Court: So received.

(The document was marked "Plaintiff's Exhibit 8.")

Mr. Owen: Q. It is correct, is it not, that after Mr. Stadtfeld went to Los Angeles in April, 1934, you were not in production, yourself, until about July. I believe that was your testimony.

A. Not in production in any large quantity. [298]

Q. It is also true, is it not, that there has been a widespread adoption and City approval of this Metalbestos and Payne-A-Vent put out by yourself and by the plaintiff? A. Oh, yes.

(Testimony of El Roy L. Payne.)

Q. Practically anywhere you can use it now?

A. I would not say that. We still have not got it approved in Long Beach.

Q. I think you stated there were some 400 cities in which it is approved now.

A. I do not recall making such a statement.

Q. I understood you on direct to say about 400 cities. Is it approved in every Pacific Coast Building Conference city?

A. No. While other Pacific Coast Building Conference recommendations are that it is approved, in other words, it is approved by the conference as a whole, but every city that operates under the conference has the privilege of accepting or rejecting that recommendation. That happens to be the case at Long Beach, that place happened to be a member of the conference, but that has not accepted the recommendation of the Conference as a whole.

Q. How many are there in the conference?

A. I believe there are between 300 and 400; that is something I am not saying definitely, that is not a definite statement, but that is what I have been advised by Mr. Merrill.

Q. You have produced here as Defendant's Exhibit 22 a purported model of the O'Toole reference. In this model the asbestos is not wound into the seam of the outer tube, is it?

A. No, but that would be a simple matter to do.

Q. Could you do it practically?

A. Yes, you could take the asbestos and pull it over and put it in there.

(Testimony of El Roy L. Payne.)

Q. At the same time the seam is formed?

A. Yes. It will take a little more time, of course, but it could be done.

Q. And on this O'Toole pipe there is no spacing of the inner and outer shell, is there?

A. By means of the asbestos. [299]

Q. There is spacing so that you can have a male joint on the inner tube and a female on the outer tube, according to the structures that are in suit?

A. Well, it could be done very easily.

Q. But it is not present?

A. I could not say because I did not personally make it.

Q. Well, look at it. It is not present in this model, is it?

A. Well, I would have to take and figure the diameter of this to see whether it is cut larger or smaller at that end.

Q. What I mean is this, I am assuming you had a plurality of these tubes, the inner tube, here, would not make a male joint with the female end of the next joining tube, would it—they are both the same diameter?

A. That is what I tried to answer before, if this is cut 1/16 smaller at one end than the other, in the cutting of it and in the rolling of it—in other words, you have to figure the thickness of the metal to allow for it; generally this one end, if cut slightly lesser than the other, it makes a tapering joint which would easily fit in there.

(Testimony of El Roy L. Payne.)

Q. Does the O'Toole patent teach that?

A. I don't know.

Q. Have you read the O'Toole patent?

A. I have not.

Q. Is there anything in this O'Toole pipe to keep the condensate from getting to the layer of asbestos?

A. No; I believe according to this it could go right into that.

Q. It would soon destroy its insulating value, would it not?

A. Yes, if it was made the way that pipe is made.

Q. A few moments ago, in speaking of approving pipes, Mr. Connor mentioned a pipe with an inner and outer tube with a corrugated spacer there as being an approved type. That is now an approved type, is it, in Los Angeles?

A. I really do not know. The fact of the matter is, isn't there a pipe approved in Los Angeles that hasn't a spacer in it?

The Court: You are to answer the question, and not ask the [300] question. A. I don't know.

Mr. Owen: When you answered Mr. Connor's question were you referring to a pipe like Exhibit G, the one that came up from there? A. Yes.

Q. That pipe is not approved today in Los Angeles, is it? A. No.

Q. There is one other publication here, Pacific Coast Building Conference publication, "Building

(Testimony of El Roy L. Payne.)

Standard” for July, 1936, page 15. Is that an advertisement of your company? A. Yes.

Mr. Owen: I offer that in evidence as Plaintiff’s Exhibit 9.

The Court: It will be received.

(The document was marked “Plaintiff’s Exhibit 9.”)

Mr. Owen: That is all.

Redirect Examination

Mr. Connor: Q. Did you understand counsel’s question when he asked you with reference to my question regarding the approval of a pipe with a corrugated spacer, which I understand you testified had been approved, was the Payne-A-Vent with a corrugated asbestos spacer or the Exhibit G that we have there?

A. I thought he was referring to a pipe like Exhibit G.

Q. When you answered my question regarding the corrugated spacer that had been approved, what did you have in mind at that time, the asbestos spacer or the metalbestos corrugated spacer?

A. I understood in your question you were referring to Payne-A-Vent, which has a corrugated spacer, the entire length made of corrugated asbestos paper.

Q. That is what you had in mind when you said it had been approved?

(Testimony of El Roy L. Payne.)

A. Yes. But when Mr. Owen asked me if this particular pipe, Exhibit G, was not approved, and that is the galvanized inner pipe and outer pipe, and with just a strip of metal as a spacer.

Mr. Connor: That will be all. [301]

DONALD DOUGLAS FLEMING,

called for the Defendant; sworn.

Mr. Connor: Q. Your address, Mr. Fleming, and your full name.

A. Donald Douglas Fleming, 28 Marietta Drive, San Francisco.

Q. What is your business?

A. Branch manager for the Payne Furnace & Supply Company in San Francisco.

Q. How long have you been so employed?

A. Since May 15, 1933.

Q. That is, as branch manager at San Francisco?

A. I would say since February, 1934, I have been branch manager. Prior to that time I was assistant to the branch manager. [302]

Mr. Connor: Your Honor, I was a little bit in error a few moments ago when I withdrew this length of pipe as one of our exhibits, and accepted the one offered by plaintiff. I wish to offer it again, because this is a pipe manufactured by the plaintiff without the asbestos lining.

(Testimony of Robert F. Williams.)

The Court: It will be Defendant's Exhibit 25 in evidence.

(The device was marked "Defendant's Exhibit 25.")

ROBERT F. WILLIAMS,

called for the Defendant; sworn.

Mr. Connor: Q. Mr. Williams, you are an officer of the plaintiff corporation? A. I am.

Q. And you are the Mr. Williams of Williams Wallace & Co.? A. I am.

Q. There were two circulars introduced in evidence as Defendant's Exhibits 7-A and 7-B, this one, and the other was a narrow folded circular which plaintiff has admitted publishing and distributing. Can you state about when Exhibits 7-A and 7-B were first printed and distributed?

A. I could not without examining our records.

Q. Have you any idea, at all?

A. I would say the latter part of 1935, approximately the latter part of 1935.

Q. I notice these circulars have your patent number on them.

A. Yes. We would not have printed that unless we had the patent.

Q. Shortly after the patent issued on September 3, 1935? A. Yes.

Q. Probably printed and published shortly after the issuance of [303] the patent? A. Yes.

(Testimony of Robert F. Williams.)

Q. You have continued to distribute these circulars since that time, have you? A. Yes.

Q. When did the plaintiff first start manufacturing and selling the vent pipe illustrated in Defendant's Exhibits 7-A and 7-B?

A. About the middle of September, 1935, that is approximate.

Q. The middle of September, 1935?

A. That is an approximate date, from there, we will say, to the 1st of October.

Q. That is the vent pipe shown here by Defendant's Exhibit 25?

A. No, that is not the vent pipe.

Q. What is the difference between this vent pipe here and the one shown in the circular Exhibit 7-A?

A. The difference between the two is that the one shown here in the folder has an inner shell of aluminum with two layers of one-quarter inch air cell asbestos paper surrounding the aluminum pipe and in which that is encased in a galvanized jacket or galvanized pipe.

Q. Defendant's Exhibit 7-B, the cylindrical pipe shown on the left of the cut, indicated by the figure 2, shows ventilated spacer rings made of corrugated asbestos? A. Yes.

Q. Those are your rings which are perhaps two or three inches higher, are they not?

A. Yes, approximately, but they were still cut from asbestos, from $\frac{1}{4}$ -inch air cell asbestos paper.

(Testimony of Robert F. Williams.)

Q. Then in Exhibit 7-A, is that made in accordance with Exhibit 25—I mean Exhibit 25 is like Fig. 2 in Defendant's Exhibit 7-A? A. Yes.

Q. You continuously made vent pipe since that time, since you started, you made it and sold it, it has been continuously on the market?

A. Not that type of construction.

Q. How long has the pipe of Exhibit 25 been on the market?

A. That I would not say, I would not care to say without looking up our records. [304]

Q. Taking the cylindrical vent pipe of Defendant's Exhibit 7-A and the cylindrical vent pipe of Defendant's Exhibit 7-B, which came first in the field of manufacture?

A. The quarter-inch air-cell asbestos wrapped in the aluminum.

Q. Then that structure was replaced by the structure of Exhibit 7-A? A. 7-A.

Q. Which would be Exhibit 25 you have identified here? A. Yes.

Q. Either one of them has been continuously on the market since September, 1935? A. Yes.

Mr. Connor: That is all.

Cross Examination

Mr. Owen: Q. Mr. Williams, I want to call your attention to the patent number which appears on Exhibit 25, and ask you if this pipe is made under the patent of that number?

(Testimony of Robert F. Williams.)

A. No, that was marked erroneously.

Q. Who called it to your attention?

A. I think you did.

Q. What was done when I called it to your attention?

A. It was immediately changed to the proper number.

Q. You have a patent covering this particular pipe? A. Yes.

Q. Do you know the number of the patent?

A. Not without looking at the record.

Q. I believe your testimony was that Exhibit 7-A was distributed in the latter part of 1935; is that correct?

A. If I said that I was mistaken. I had reference to this folder, here.

Q. Exhibit 7-B?

A. Yes, that is right.

Q. Do you have any recollection as to when Exhibit 7-A was printed?

A. Not without looking at our records.

Q. Was it later than September?

A. Oh, yes, it was considerably later.

Q. Is the construction of Exhibit 7-A fairly recent? [305]

A. It is comparatively recent.

Q. Does your company make the construction of the patent in suit as shown in Plaintiff's Exhibit 4 and the construction shown in Defendant's Exhibit 25?

(Testimony of Robert F. Williams.)

A. We make both kinds of construction.

Mr. Owen: That is all.

Redirect Examination

Mr. Connor: Q. Mr. Williams, have either of these pieces of pipe shown in Defendant's Exhibit 25 and Plaintiff's Exhibit 4 been approved by any building department in cities?

A. They have been approved by the City of Los Angeles, and all of the cities that are members of the Pacific Coast Conference.

Q. Which of the structures, Defendant's Exhibit 25 or Plaintiff's Exhibit 4 is the structure which has been approved?

A. Both structures have been approved by the City of Los Angeles. I will correct that—by the Pacific Coast Officials Conference.

Q. Isn't it the fact that the structure which has been approved in Los Angeles is the one without the asbestos? A. That is true.

Q. Isn't it a fact that the vent pipe without asbestos is the one which has been approved in San Francisco? A. That is true.

Q. And in neither instance has the one with the asbestos lining been approved in either San Francisco or Los Angeles?

A. Except by the Pacific Coast Conference.

Q. Except by the Pacific Coast Building Officials Conference? A. That is true.

Mr. Connor: That is all.

(Testimony of Robert F. Williams.)

Recross Examination

Mr. Owen: Q. Can you tell why your company has not bothered to get the approval of the City of Los Angeles and the City of San Francisco on that construction, that is Plaintiff's Exhibit 4 and Defendant's Exhibit 25?

A. Because due to a matter of competi- [306] tion we were forced to go to this type of pipe, this type of construction.

Q. Defendant's Exhibit 25?

A. Defendant's Exhibit 25, with the vitrified spacer as illustrated and described in this folder 7-A.

Q. Do I understand that because of this competition you went to the Exhibit 25 type of construction, which is less expensive? A. That is true.

Q. When you went to the less-expensive construction did you cease your efforts to get approval of the other pipe? A. That is true.

Q. Is it expensive to get approval of pipes by these cities?

A. From the standpoint of time involved, yes, and if these cities have a central agency such as the Pacific Coast Officials Conference it is expensive.

Mr. Connor: That is all.

Mr. Owen: That is all.

Mr. Connor: That is the case, your Honor.

WILLIAM A. WALLACE,

called for the Plaintiff in rebuttal; sworn.

Mr. Owen: Q. Mr. Wallace, will you please give us your name and your occupation?

A. William A. Wallace, 56 years of age, general manager of the Williams Wallace Company and W. R. Ames Company.

Q. What business is the Williams Wallace Company engaged in?

A. General line of sheet metal business, building supplies, such as pipes, metalbestos, navy bombs.

Q. What type of business does the W. R. Ames Company do?

A. General line of sheet metal products, building irrigation pipes, metal furnaces, library stacks, motor truck bodies—I could go on indefinitely. [307]

Q. What is your connection with the Williams Wallace Company? A. General manager.

Q. And your connection with the W. R. Ames Company? A. General manager.

Q. What is the general nature of your duties?

A. General supervision of both plants.

Q. Supervision of what?

A. Of everything.

Q. Policy? A. Policy.

Q. Who makes the contracts in your company?

A. Mr. Williams usually signs the contracts. I approve them and Mr. Folsom in the other company.

Q. You mean Mr. Williams signs the contracts for Williams Wallace Company? A. Yes.

(Testimony of William A. Wallace.)

Q. And Mr. Folsom for the W. R. Ames Company? A. Yes.

Q. But your word is final?

A. Yes, I approve of them.

Q. What would you say, taking last year, for instance, was the combined business done by these companies, the two of them?

A. Approximately one million dollars.

Q. How long have you personally been connected with the sheet metal business?

A. About thirty-four years.

Q. How long have you been in the flue pipe business? A. 24 years.

Q. Did your company prior to 1932 manufacture flue pipe? A. Yes, we always did.

Q. By that I mean the Williams Wallace Company? A. Yes.

Q. When did it begin to manufacture flue pipe?

A. It began operations in 1926, I believe.

Q. Had you had any experience in manufacturing flue pipe before that?

A. Yes, many years.

Q. Do you know Jacob A. Stadtfeld?

A. Yes.

Q. The inventor of the patent in suit?

A. Yes, I do. [308]

Q. Will you give us your recollection of your first contact with Mr. Stadtfeld?

A. The first contact I believe was in 1932, yes, in 1932. Mr. Stadtfeld came down, when we were en-

(Testimony of William A. Wallace.)

gaged in the manufacture of Navy bombs and were getting ready for them—he came to our place and wanted me to construct, to make an aluminum elbow.

Q. Approximately when was that?

A. That was in, I am sure it was in 1932, and then I think he was there again in 1933.

Q. Did he say what he wanted this aluminum elbow for?

A. Yes, he was experimenting on a vent pipe and he wanted to know if we could make an elbow out of aluminum, that he wanted to use it as a liner for a vent that he was working on.

Q. Did he explain any more about the structure that he had at that time?

A. Nothing more than he wanted to put this inside of another pipe, he had some patent or some new scheme he was working on.

Q. Did you see any models at that time that he had?

A. No, I was to make an elbow for him.

Q. Did you make the elbow?

A. Yes, we tried to.

Q. That, you say, was a liner for a flue?

A. For a flue vent.

Q. What do you mean by a liner?

A. Well, he wanted us to make a liner out of aluminum, for a new flue pipe that he was working on.

(Testimony of William A. Wallace.)

Q. Do you know the relative diameter of these flue pipes?

A. Yes, it was 3 inches, the one he had—a 3-inch elbow, and he was to put it into a 4-inch pipe.

Q. So that it would be spaced apart?

A. Yes.

Q. And it is your recollection that was in 1932?

A. Yes.

Q. You fix that because you were at that time working on the Navy [309] bomb job?

A. Yes, that is why I can fix the date, because he wanted us to go ahead further with it, and we did not want to bother with it, we were too busy.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until two o'clock.) [310]

Afternoon Session

Mr. Connor: In my haste to get through this morning, your Honor, I overlooked that I wanted to introduce a certified copy of the Building Ordinance of the City of Los Angeles.

The Court: If there is no objection it will be marked Defendant's Exhibit No. 26.

(The document was marked "Defendant's Exhibit 26.")

WILLIAM A. WALLACE,

Direct Examination

(Resumed)

Mr. Owen: Q. Mr. Wallace, after the contact with Mr. Stadtfeld, when you made the elbow, when do you next remember having a contact with him or the occasion?

A. When he was with the Standard Asbestos Company, I believe he was in once before that, but I am not positive of that, but when he was with the Standard Asbestos Company, Mr. Dutton.

Q. You say with Mr. Dutton, with the Standard Asbestos Company, as far as you know?

A. Yes.

Q. What do you know about Mr. Stadtfeld at that time as far as his work was concerned?

A. Well, he was working on this flue pipe, this new flue of his.

Q. What do you mean by new flue?

A. That is this metalbestos that we made the elbow for, with the aluminum liner—the inner pipe was made of aluminum.

Q. Are you referring to a different product there?

A. No, I am referring to metalbestos, our own product.

Q. The new form? A. Yes.

Q. You are not referring to your form of Metalbestos?

(Testimony of William A. Wallace.)

A. No, the original Metalbestos, which was the aluminum pipe with the asbestos [311] wound corrugated paper on it, asbestos paper, and then galvanized outer pipe.

Q. Just as made by the defendant? A. Yes.

Q. What was the Standard Asbestos Company doing in connection with that pipe, if you know?

A. Well, they were selling that pipe, and they were finishing it, that is, completing the assembly of it; we were manufacturing for the Standard Asbestos Company the aluminum pipe and elbows and connections.

Q. You mean the galvanized outer casing?

A. Yes, I call them the outer casing.

Q. By "you" you mean the plaintiff in this case, the Williams Wallace Company? A. Yes.

Q. Let me see if I get this correct: The Williams Wallace Company made the aluminum pipe and the outer casing and sold them to whom?

A. To the Standard Asbestos Company.

Q. And then they did what?

A. They, in turn, wrapped it with the air cell asbestos and they sold it; they were in the business of assembling it and selling it.

Q. How long do you remember that that went on?

A. I don't recall how long that went on. I would have to look at the records on that.

Q. Did you cease making those parts for the Standard Asbestos Company?

(Testimony of William A. Wallace.)

A. Yes, I don't know at what time, but later we ceased making them, because Stadtfeld went to the Payne Supply & Furnace Company later and the Standard Asbestos continued it, and the next thing we knew the Payne Furnace & Supply Company was making some sort of a deal with Metalbestos.

Q. Did you continue to manufacture component parts for Payne Furnace & Supply Company?

A. I believe we sent some samples down; I do not recall making them as a regular thing.

Q. But just certain parts?

A. Just certain parts; we might have [312] made some elbows for them, I am not sure; we probably sent some samples or made some for them, I would not say for sure.

Q. This Metalbestos pipe about which you are testifying, had you ever seen any flue pipe made like that before? A. I never did.

Q. In any of your experience in the flue business? A. No.

Q. How long have you been in the flue business?

A. I would say for about 24 years.

Q. What was your next contact with Mr. Stadtfeld?

A. It was somewhere in the fall, early fall, I would say September, 1934.

Q. What was the occasion of your conversation with Mr. Stadtfeld then?

A. In 1934, September, Mr. Stadtfeld had written a letter along in, I believe, August, stating that

(Testimony of William A. Wallace.)

he did not get entirely what he expected from the Payne Furnace & Supply Company, and wanted to know if we would be interested in talking the manufacture of this flue pipe over with him.

Q. What did you do with that letter?

A. I threw it away, because we were not interested at that time, at all.

Q. Did you answer the letter? A. No.

Q. What was the date of this conversation about which you testified?

A. That was a letter. That was not a conversation. That was a letter.

Q. In August, 1934?

A. Yes, sometime in August.

Q. Now, you say you threw the letter away?

A. Yes.

Q. Did Mr. Stadtfeld follow that up and call on you?

A. I think a day or two before Labor Day, or a day or two after Labor Day.

Q. In what year? A. 1934.

Q. What did he say to you then?

A. Well, he wanted to talk over us making Met-albestos, and I told him we were not interested in it, the thing had been pitched from pillar to post, and he had moved from here, and we were not interested in it. He began to [313] tell me how good the thing was going over and what wonderful results they had from it. I can recall perfectly now that I said to him, "How is it you are moving from

(Testimony of William A. Wallace.)

one place to another, and what have you done with any rights you have under that?" So he told me that he had assigned all rights to Mr. Dutton, of the Standard Asbestos Company, and I asked if Mr. Payne or anyone else he had been with had any rights, and he said no, Dutton held all the rights. I said, "I will look into it, I won't say anything now."

Q. Then what did you do?

A. Then I think two or three days later I went up to see Mr. Dutton, and I told him my conversation with Stadtfeld, and I wanted to know just what happened to this thing, that Stadtfeld was here and there, and Mr. Dutton told me that Stadtfeld had assigned all of his rights under the patent or trade-mark or any rights accruing under the patent and trade-mark to Mr. Dutton.

Q. Did Mr. Dutton have anything?

A. Yes, Mr. Dutton told me then, I asked him just what the arrangement was, and he told me all about it.

Q. What was it he said?

A. He said he had a signed contract from Stadtfeld giving him all rights.

Q. Did he show it to you?

A. Yes. And he wanted to know if I was interested in it, and I said yes. He said, "What I am interested in is to get my money back that I advanced to Stadtfeld and the money I spent. I said, "Are you sure you have all the rights?" And he

(Testimony of William A. Wallace.)

said, "Yes, I am positive of it." And I said, "Well, suppose we go ahead and take this on would you be willing to give me those rights?" And he said, "Yes, provided I get the expenses and the money I have advanced Mr. Stadtfeld." I said, "All right, that is a deal," so that was the agreement Mr. Dutton [314] and I had.

Q. Was any mention of the Payne Furnace & Supply Company made at that time?

A. I believe Mr. Dutton spoke of some unsatisfactory arrangement that he had previously with the Payne Furnace & Supply Company, that they did not fulfill, and that he would give them to us with the full understanding that we would reimburse him from any royalty that we might collect for Stadtfeld if and when a patent was issued, pay him back the money he had expended or advanced, in the way of expenses and other incidental expenses in carrying this on.

Q. Do you remember how much stock he had on hand at that time of Metalbestos?

A. I believe he had something like around 2000 or \$2500.

Q. Of complete Metalbestos?

A. Stock on hand.

Q. Did he show you at that time the contract he had with Mr. Stadtfeld assigning all of his rights in Metalbestos to him?

A. He did.

Q. I hand you a paper and ask you if you can identify that.

A. Yes.

(Testimony of William A. Wallace.)

Q. What is that?

A. Well, that is the assignment from—I would have to read it to really tell you what it is.

Q. Have you ever seen that before?

A. Yes, I have. Mr. Dutton first showed it to me and later gave it to me.

Q. You mean at that conversation about which you testified? A. Yes.

Q. Is that the contract on which he based his ownership of the invention of Stadtfeld?

A. Yes.

Q. Now, this agreement that you made with him——

A. (Interrupting): It was verbal.

Q. That was a verbal agreement? A. Yes.

Q. Can you tell us what that was?

A. If and when a patent be granted to the Williams Wallace Company, out of the royalties we [315] would agree to pay to Mr. Stadtfeld—we were to deduct 66 $\frac{2}{3}$ per cent. and hold them for Mr. Dutton until we had paid him the sum of \$800.

Q. That was an oral agreement?

A. That was an oral agreement, that was contingent upon us getting this agreement, that is, the assignment.

Q. The assignment? A. Yes.

Q. The payment of anything was contingent upon the patent issuing? A. Yes.

Mr. Owen: I offer in evidence the contract referred to by the witness. It is dated September 2,

(Testimony of William A. Wallace.)

1933, and is signed by Harry Dutton and J. A. Stadtfeld, as Plaintiff's Exhibit 10.

Mr. Connor: I object to the offer, your Honor, on the ground that this purports to be an agreement to assign rather than an assignment; of course, it would only convey an equitable title if any, and even if it is claimed to be an assignment, I object to it on the ground that it has never been recorded in the Patent Office, and since this purported assignment or agreement to assign Mr. Stadtfeld has assigned his invention to the Williams Wallace Company, which assignment is a matter of record in this Court, and the law provides that unless the assignment is recorded in the Patent Office within three months from its date it is null as against subsequent assignments for value without notice; it is not within three months prior to any subsequent sale. In so far as the title to the patent in suit is concerned by assignment, this is a mere nullity; there is nothing to it, because the assignment is made directly from Stadtfeld to the plaintiff, so this paper means nothing.

Mr. Owen: If your Honor please, as far as this paper goes we claim that this paper passed equitable title to Mr. Dutton [316] in that invention and that subsequent to the execution of this contract Mr. Dutton assigned it to the Williams Wallace Company, and then Williams Wallace Company, having acquired the equitable title, Mr. Stadtfeld

(Testimony of William A. Wallace.)

executed the formal document passing legal title to Williams Wallace Company, which assignment was recorded in the Patent Office. Now, there is certainly nothing illegal in that.

Mr. Connor: There is nothing to it. In other words, Mr. Dutton had an equitable right which he would have to acquire a legal right to by a suit for specific performance.

The Court: It would be good between the parties. It would not be good as between a third person.

Mr. Owen: That is correct.

Mr. Connor: It is a mere nullity as far as the title of the patent in suit is concerned, because Stadtfeld is the inventor and Stadtfeld has made an assignment directly to the plaintiff.

The Court: It shows the story of what was going on. Of course, as to the weight to be given it, that is a different thing. It is part of this transaction. You have presented this matter in all of its detail, and I will receive it, not with the idea of recognizing it, but just for what it is. I mean it simply represents what it is.

Mr. Owen: That is the assignment of the invention.

The Court: It will be marked Plaintiff's Exhibit 10.

(The document was marked Plaintiff's Exhibit 10.)

(Testimony of William A. Wallace.)

Mr. Owen: Q. After you made this oral agreement with Mr. Dutton and acquired his rights in that invention, what did you do with relation to Mr. Stadtfeld?

A. We took Mr. Stadtfeld on, I think, around the middle of September, at, I believe, a weekly salary.

Q. What was your agreement with him for compensation? [317]

A. I believe it was \$35 a week.

Q. Is that all?

A. That was all we paid him at that time, but we had made an agreement with him that if and when we were able to secure a patent on this invention that we would give him 25 per cent. of the net profit from the sale of Metalbestos.

Q. Was that a written agreement at that time?

A. No, that was just a verbal agreement at that time, because we did not have a patent, but as soon as we secured the patent we executed that in legal form.

Q. When did you first start in with the manufacture of Metalbestos?

A. Immediately, because we had made the component parts before and we had seen everything, and there was not anything to do except start in and make it.

Q. You began the marketing of it then?

A. Right away.

(Testimony of William A. Wallace.)

Q. Did you have an application for patent prepared under that invention? A. Yes, we did.

Q. Did you have an application for trade-mark for registration prepared? A. We did.

Q. Is that the patent and the trade-mark that have been introduced in evidence here? A. Yes.

Q. When did you know that the patent was going to issue on that application?

A. In the spring, along in May, I believe, of 1935.

Q. What sort of a notice had you at that time?

A. We had advice from our attorney that our claims would be allowed on the patent.

Q. Subsequent to the receipt of that notice did you do anything toward reducing the agreement with Mr. Stadtfeld to writing?

A. Yes, when we found that we had a patent on there we entered into a formal assignment to make it legal between Mr. Stadtfeld and the Williams Wallace Company.

Q. Is that the contract you have in your hand?

A. This is the contract. It states royalties, I believe, too. [318]

Q. Is that your signature at the end of that contract? A. Yes.

Q. Does that contract embody the agreement which you previously testified was an oral agreement with Mr. Stadtfeld? A. Yes.

Q. And by that you were to pay him a royalty of 25 per cent. and hold two-thirds of it for Mr. Dutton until he got \$800? A. Yes.

(Testimony of William A. Wallace.)

Q. Was that contract carried out?

A. To the letter.

Q. Mr. Dutton got his \$800? A. Yes.

Q. At the time of applying for the application for patent did you secure, or your patent attorneys secure from Mr. Stadtfeld a formal assignment to be filed with that application? A. Yes.

Q. Was that assignment prepared in pursuance of the agreement between yourself and Mr. Dutton, giving you all the rights in the invention?

A. Yes.

Q. Did Mr. Stadtfeld understand that when he signed that assignment? A. Perfectly.

Mr. Owen: I offer in evidence a contract dated August 1, 1935, between Jacob A. Stadtfeld and William Wallace Company as Plaintiff's Exhibit 11.

The Court: It will be so received.

(The document was marked "Plaintiff's Exhibit 11.")

Mr. Connor: I was just glancing at it, your Honor. I do not know whether it is objectionable, or not.

The Court: You should have seen it before it was offered. You have a right to see these papers before they are offered.

Mr. Connor: There is objection to be made at this time.

The Court: As soon as he shows a paper you have not seen before he should display it to you. I

(Testimony of William A. Wallace.)

don't know whether you have seen the paper. I expect counsel are familiar with the other side's papers that are presented and are not in ignorance of what [319] is attempted to be shown. All right, proceed.

Mr. Owen: Q. Is the product shown here in Plaintiff's Exhibit 4 manufactured by your company under the patent in suit? A. Yes.

The Court: You are referring to what, for the record?

Mr. Owen: Exhibit 4.

Q. I show you a copy of Exhibit 2, which is a formal assignment recorded in the Patent Office in Liber B 163, page 592, assigning all right, title and interest in an invention of the patent in suit to Williams Wallace Company. Do you remember such an instrument? A. Yes.

Q. That was prepared pursuant to the assignment from Dutton to you of the title and all rights in this invention? A. Yes.

Q. You referred a moment ago to the trade-mark application being prepared and filed. I hand you a trade-mark registration and ask you if you can identify it. A. Yes.

Q. Is that the one secured pursuant to the rights of Mr. Dutton? A. Yes.

Mr. Owen: That is Metalbestos trade-mark No. 323,163, registered April 2, 1935, of an application filed November 17, 1934. I offer that in evidence as Plaintiff's Exhibit 12.

(Testimony of William A. Wallace.)

The Court: It will be received.

(The document was marked "Plaintiff's Exhibit 12.")

Mr. Owen: Q. Do you know Mr. E. L. Payne?

A. Yes.

Q. Is he the E. L. Payne who testified in this case? A. Yes.

Q. Did you ever have any contact with Mr. Payne with regard to Metalbestos?

A. Yes, we did.

Q. When you say we did, did you, yourself?

A. Yes, I did, personally.

Q. Will you tell me the occasion of your contact with Mr. Payne with regard to Metalbestos?

A. Yes. Mr. Payne came up—— [320]

Q. Up where?

A. Up to our office, Williams Wallace's office, at 160 Hooper street, and discussed the Metalbestos vent pipe situation, and told us that we were foolish to try to get a patent on it, that a patent could not be secured on it, he had had advice on it from his attorney, and said that it would be a whole lot better to refrain from the expense of trying to get a patent on it, he was sure it would not be allowed. He thought it would be better if we would get together, inasmuch as he had a selling organization in that line, related to his furnace line, he would take over the selling and we the manufacture of it; otherwise, if we did not get together every Tom, Dick and

(Testimony of William A. Wallace.)

Harry would be in the business, because we could not get a patent.

Q. Who was present at this conversation besides yourself? A. Mr. Williams.

Q. Was Mr. Payne alone?

A. Mr. Payne and Mr. Williams.

Q. When was this conversation, do you remember?

A. That was in the fall of 1934.

Q. Did the subject of patents or trade-marks come up at that time?

A. Yes, Mr. Payne cited three patents that his attorney, I believe he said, had advised him would prevent us from getting a patent, or would be cited against us, and I think Mr. Payne gave the patent numbers; in fact, I know he did, and Mr. Williams copied them down.

Q. What was the outcome of that conversation?

A. Mr. Payne, I believe, at that time wanted to know if we could let him know what we would do in regard to the suggestion he put forth, and we told him that we could not decide that because it was a matter of policy, and we would have to take that up with Mr. Ames.

Q. Who was Mr. Ames?

A. Mr. Ames was president of the company.

Q. At that time? A. Yes.

Q. Has he since passed on? A. Yes. [321]

Q. What did you do then, what happened next?

A. We did not do anything at that time because

(Testimony of William A. Wallace.)

Mr. Ames was seriously ill, we could only get to see him at very infrequent intervals, so we decided not to bother him about it.

Q. What happened next then?

A. Next we received a letter from Mr. Payne.

Q. Under what date?

A. Under date of December 27, 1934.

Q. What did the letter inquire about?

A. Well, I could read it, it is very short:

“Williams Wallace,
160 Hooper Street,
San Francisco, California.

“Gentlemen:

“We have been patiently waiting for a letter from you, which you promised to send us soon after the 15th of this month. In fact, you assured me we would hear from you not later than December 19th. It is now the 27th and still no word from you. Please advise us as to your intention in regard to the matter we discussed.”

That recalls another subject we discussed with Mr. Payne. He told us that he had been in this patent business for a long while, and so far as paying attention to patents, his experience was that they did not amount to the trouble, you could not get a patent, and even if you did you could not do anything about it, and advised us not to try to get it, that it was a useless expense.

(Testimony of William A. Wallace.)

Q. What did you say to him with regard to your success in getting a patent?

A. Well, of course, I said "That is up to the Patent Office, we don't know, we are not the judge, but if we do we expect you to discontinue the manufacture of the pipe."

Q. Was any reply made to that letter that you just read?

A. Yes, under date of January 2.

Q. Did you see the original of this letter?

A. Yes, I saw that. [322]

Q. You saw it before it went out? A. Yes.

Q. At the time it went out? A. Yes.

Q. Just state briefly, did you accept his proposition? A. No.

Q. What did you tell him?

A. We told him we were very careful before we went into this Metalbestos, before we took Stadtfeld on, and that we investigated and found as near as we could we had a perfect right to a patent, and once we started something and felt we were right we were going ahead with it.

Mr. Owen: I offer in evidence the two letters referred to by the witness, the one dated December 27, 1934, as Plaintiff's Exhibit 13-A, and the letter of January 2, 1935, as Plaintiff's Exhibit 13-B.

The Court: They will be marked 13-A and 13-B, respectively.

(The documents were marked, respectively, Plaintiff's Exhibit 13-A and 13-B.)

(Testimony of William A. Wallace.)

Mr. Owen: Q. Did you have any further visits from Mr. Payne with regard to Metalbestos?

A. Yes, in the spring of 1935 Mr. Payne and Mr. Fleming came into our office.

Q. Who was there besides yourself?

A. No one.

Q. What office?

A. In the Williams Wallace Company, 160 Hooper street.

Q. What transpired at that meeting?

A. Mr. Payne said I slipped up on getting the rights from Mr. Dutton and suggested, in fact I believe he made the offer, that he had been established then in the manufacture and distribution of metalbestos, and said if we knew the expense, which he said he estimated to be somewhere around \$2000 or \$2500 that he thought that it would be a good business proposition for us to consider giving him the right that we had from Mr. Dutton.

Q. Was anything else said at that conversation?

A. Yes, we [323] Mr. Payne that if it was worth \$2500 to him it was worth \$2500 to us.

Q. What was his apparent object in coming for that visit?

A. Well, I believe that he knew that we were being allowed a patent, that our patent claims had been allowed.

Q. Had you had notice by that time that they were allowed? A. Yes.

(Testimony of William A. Wallace.)

Q. Had you done anything toward passing word around to the trade that they had been allowed?

A. Yes.

Q. What was the upshot of that conversation?

A. Nothing; we did not accept the proposition.

Mr. Connor: Mr. Wallace, I wish you would speak up a little louder.

A. We did not accept his proposition. I am a little hoarse with a cold. I think that is the reason.

Mr. Owen: Q. Was there any dispute between your company and Mr. Payne's company over the Metalbestos trade-mark? A. Yes.

Q. What was the nature of that dispute?

A. We notified Mr. Payne to discontinue the use of the trade-mark "Metalbestos" and later he wrote us a very nice letter saying that he would relinquish all right to the name Metalbestos under our trade-mark.

Q. Then he acquiesced in your right to use that trade-mark?

A. Yes, he did. I think that was in the letter.

Q. Was that embodied in a letter? A. Yes.

Q. I hand you Plaintiff's Exhibit 8 and ask you if that is the letter to which you refer. A. Yes.

Q. Do you remember whether the letter was received before or after Mr. Payne's second visit about which you testified?

A. I believe that was after.

Q. Did your company ever buy that stock of Mr. Dutton?

(Testimony of William A. Wallace.)

A. Yes, we took the remaining stock. [324]

Q. Do you remember about how much it was by the time you bought it?

A. I think somewhere around \$800, although I am not positive about that.

Q. You mean this price you paid for it?

A. Yes, I believe this price, I am not positive, I am not positive about the price, but I know we bought the stock and we paid for it. The record will show what we paid for it, how much it was.

Q. Do you remember whether your purchase of that stock was before or after Mr. Payne's second visit to you?

A. After. I think that was in the fall of 1935.

Mr. Connor: The date of the second visit, when was that?

A. Along in the spring of 1935.

Q. In the spring of 1935? A. Yes.

Q. I believe you testified that it was after the allowance of the patent?

A. After we had learned that the claims were going to be allowed.

Mr. Owen: He did not state it was the allowance of the application. There were some claims allowed by that time. That is correct, is it not, Mr. Wallace? A. Yes.

Q. Did you have any knowledge of your own when Mr. Stadtfeld came to work for you as to his financial condition?

(Testimony of William A. Wallace.)

A. Yes, when he came to us to work for us he told us he was in very bad shape financially; he was not making enough down there to get along on, and, well, he was just about up against it as bad as a man could be.

Mr. Owen: That is all.

Cross Examination

Mr. Connor: Q. When did you say you first started to manufacture this Metalbestos after Mr. Stadtfeld approached you and saw you, I mean?

A. You mean after he came with us?

Q. In the fall of 1934.

A. We began immediately, around about the [325] 15th or 16th of the month, after he came with us.

Q. In answer to the interrogatories it is said that you made your first sale on September 14, 1934.

A. Well, I would not know that.

Q. That would be correct, as stated in your answer to interrogatories?

A. I know it was around that. I believe we put him on the payroll somewhere around the 15th.

Q. You say Stadtfeld first approached you after leaving the Payne Company along about Labor Day, or shortly after Labor Day, 1934? A. Yes.

Q. And you state that you went into the matter very thoroughly before you made arrangements with Stadtfeld—that was between September 3rd and

(Testimony of William A. Wallace.)

the 14th, about ten days, is that it? A. Yes.

Q. And it was during that period of time you contacted Mr. Dutton? A. Yes.

Q. At the time you approached Mr. Dutton did he inform you in any way that he had an agreement with Mr. Payne to sell the entire stock to Payne? A. He what?

Q. To tell the entire stock of Metalbestos products to Mr. Payne, when Payne took over the manufacture of Metalbestos?

A. Well, not in so many words. He told me he had an agreement with Mr. Payne whereby Mr. Payne would take all of his stock, his remaining stock of Metalbestos, and Mr. Payne had not lived up to his agreement.

Q. Well, now, just how much stock did Mr. Dutton have on hand at the time he made this agreement? A. I could not say.

Q. Did he have a few feet, or hundreds of feet, or what?

A. I never looked at it at all. I did not ask him. I was only after him for his rights.

The Court: Q. In other words, you don't know? A. No. [326]

Q. Just say so.

Mr. Connor: Q. You say now you paid Mr. Dutton \$800 for this stock of material you had on hand?

A. I do not say we paid him that. I would have to refer to the records to see what we paid him.

(Testimony of William A. Wallace.)

Q. Can you ascertain from your records how much stock you bought from Mr. Dutton?

A. I think we could, yes.

Q. Will you do so, please?

A. I don't know whether we have the records here or not.

Q. Now, in these arrangements that Mr. Dutton had with Mr. Stadtfeld, it speaks of Mr. Dutton paying \$37.50 to the patent attorney, Stadtfeld agrees to arrange with the attorney to pay him in full, we guaranteeing the attorney account up to \$90. Had Mr. Dutton told you that he had paid \$90 to a patent attorney?

A. That he had paid?

Q. At the time you made your arrangement with Mr. Dutton to take over this did he say he had paid any part of this money to a patent attorney?

A. I do not recall whether he did or not.

Q. Did he advise you that any application had been prepared by a patent attorney or had been filed prior to that, prior to the first part of September, 1934?

A. I don't believe he did. At least I did not ask him about it.

Q. At least your company did not take over any application which had previously been filed, that is, filed previous to September, 1934?

A. I would have to check; from memory I could not say on that. I would not want to commit myself on that without looking it up.

(Testimony of William A. Wallace.)

Q. Do you recall whether in making your arrangements with Mr. Stadtfeld there was anything mentioned of any application for a patent on this vent pipe having been filed prior to that time?

A. Yes, he had mentioned that he had taken it up with an attorney and paid so much money. I don't know whether he or Mr. Dutton had paid it, but [327] I don't think it had ever gone further than that.

Q. Did they specify which vent pipe the application covered? A. Yes.

Q. Are you certain now that it covered Metalbestos or some other vent pipe?

A. It covered the vent pipe with the aluminum and air cell asbestos.

Q. You are certain they told you that: is that it?

A. I believe Mr. Dutton did.

Q. You say Mr. Dutton told you that an application had been filed?

A. No, I do not say Mr. Dutton said it. I said Mr. Stadtfeld did. I don't know whether Mr. Dutton did or not. Mr. Dutton did not tell me anything in regard to that, I do not believe.

Q. What date did Mr. Stadtfeld go to work for your company?

A. I believe it was the 15th of September; I believe he went on the payroll on the payroll on the 15th of September, 1934.

Q. What were his duties?

(Testimony of William A. Wallace.)

A. His duties were to enlarge upon the scope of Metalbestos and to sell it, in other words, promote the use and sale and also to see that the various cities and towns would give approval for it, and conduct tests.

Q. When he came to you did he bring with him any sample or any pipe which had been manufactured by the Payne Company? A. No.

Q. When did you first learn that the Payne Company, the defendant here, was manufacturing and selling Metalbestos vent pipe?

A. Well, I do not recall the date; it was after the Standard Asbestos quit buying from us, or sent any order in to us for manufacture for them.

Q. Would you have learned of it in the early months of 1934, April, May, some place around there?

A. Probably I would have, yes, probably in the early summer.

Q. Probably in the early part of 1934?

A. Probably in the early summer. [328]

Q. You knew that that time that the Payne Company was using the trade-mark "Metalbestos" on their product, didn't you? A. Yes.

Q. During the period of time before Mr. Stadtfeld came to you you knew that the Payne Company was advertising vent pipe as Metalbestos?

A. Yes.

Q. What representation did Mr. Stadtfeld make to you, if any, when he approached you as to what

(Testimony of William A. Wallace.)

rights he could convey to you in addition to those rights that might be conveyed by Mr. Dutton?

A. He did not have any other rights; he said he had assigned all of his rights to Mr. Dutton, any rights he had in the invention were turned over to Mr. Dutton. He did not have any.

Q. Did you know in making this arrangement with Mr. Dutton whether he was then at that time, or had been shortly prior thereto, either making or selling Metalbestos vent pipes?

A. That Mr. Dutton had?

Q. Yes, whether he had been making or selling metalbestos. A. Prior to what?

Q. Your making your arrangement with Dutton.

A. Oh, yes, he made them. Mr. Dutton made them. We manufactured parts for him and he assembled them and sold them.

Q. During what period of time?

A. I think that was in 1933.

Q. That was when Mr. Stadtfeld was with him in the fall of 1933? A. With Mr. Dutton, yes.

Q. You don't know, yourself, what material you took off Mr. Dutton's hands at the time you made this arrangement with him in the fall of 1934?

A. Well, not by piece now. I could not describe the pieces.

Q. Do you know whether you took any?

A. Oh, yes, sure I know.

Q. Was it complete pipe or just raw material?

(Testimony of William A. Wallace.)

A. No, I believe there was some complete pipe. I don't know whether there was any raw material other than complete pipe. I think the aluminum had all been taken, I don't think he had any. [329]

Q. Do you think he had any aluminum?

A. I don't think he had any aluminum. I think we took all the other pipe and fittings.

Q. That is, the elbows and outer tubes: is that what you mean? A. Yes.

Q. Did you take any Metalbestos off of his hands?

A. I do not believe we did. I have a list of those.

Q. What is that paper you are reading from?

A. This is a memorandum of the stock.

The Court: A memorandum of what?

A. Of the stock of the Standard Asbestos.

Mr. Owen: This, your Honor, is a letter from Mr. Dutton to the Williams Wallace Company, telling what stock he had on hand, and making a proposition to sell it for \$800.

The Court: Do not refer to it unless you advise that you are referring to it. You are supposed to be testifying from independent recollection, not from any document.

A. I do not need to refer to it.

Q. You do not need to?

A. No. I have answered the question. I could not tell the component parts.

The Court: Let us proceed.

(Testimony of William A. Wallace.)

Mr. Connor: Q. What was your previous testimony about the stock?

A. Just as I told you, I couldn't remember the parts we took or the amount, I don't remember.

Q. Do you recall any further now just what materials, or pipes, or parts or so on you took on from Mr. Dutton? A. No, I do not.

Q. What discussion did you have with Mr. Dutton regarding the trade name Metalbestos at this time? I am speaking of now of when you were making a deal with him in September, 1934.

A. No discussion other than that we would file for the trade-mark.

Q. That is, you had no discussion with him about a trade-mark at [330] all. Don't you know that Mr. Dutton had discontinued business from the fall of 1933 up to the time you talked to him, that he had not been in the vent pipe business?

A. No, I do not.

Q. Of manufacturing and selling?

A. He had been selling.

Q. Now, as I understand your testimony, the Wallace Company made all of the tubes, both the aluminum tubes and the outer galvanized tubes for the Standard Investment Company to make their pipe; isn't that true? A. I believe so.

Q. Now, had Mr. Dutton purchased from your company any aluminum tubes or galvanized tubes for the outer shell between January of 1933 and the time you talked to him in the fall of 1934?

(Testimony of William A. Wallace.)

A. I could not recall from memory.

Q. You don't know that he did, that is what you mean?

A. Well, I don't know how to answer that question; I do not recall. I would not say he did not or that he did.

Q. What discussion did you have with Mr. Stadtfeld in September, 1934, regarding the trade name "Metalbestos"?

A. I do not remember any discussion during that meeting.

Q. That was not mentioned between you?

A. No.

Q. Was Mr. Williams present at each time when you had these conversations with Mr. Stadtfeld just prior to his employment? A. No.

Q. Did you conduct all of the negotiations with Mr. Stadtfeld?

A. No. At the first, Mr. Stadtfeld, when he came up there, I talked to him and asked him what rights he had in the invention, or whether he had assigned or given any way, either to Mr. Payne or the Payne Furnace & Supply Company, or Mr. Dutton, or this other firm he was with, The Acme Sheet Metal Works, when he first started out there, and he told me no, that Mr. Dutton had all the rights, and I said we would investigate it, and I did not have any more conversation until he came to work. I

(Testimony of William A. Wallace.)

told Mr. Williams about [331] it, and then after I got the rights, that is, the contract from Mr. Dutton, then I turned it over to Mr. Williams, and Mr. Williams went ahead and made the arrangements, because he came directly under Mr. Williams in selling.

Q. What form of transfer or conveyance did you obtain from Mr. Dutton of these rights?

A. Verbal.

Q. Personally? A. Yes.

Q. In other words, Mr. Dutton merely said to you if you would pay him \$800 he would give you any rights he had in the invention?

A. No, he did not say that.

Q. What did he say?

A. Mr. Dutton said that if we would agree to pay him from the royalties if and when we got a patent, that we would deduct \$800 from Stadtfeld's royalties so he could get his expenses out of it, then he would turn these over.

Q. And that applied only——

A. If and when we got a patent on it.

Q. That only applied to this alleged invention, that did not apply to anything else: you were purchasing the invention, is that right?

A. What is now called Metalbestos.

Q. That is what we are talking about in this suit, what the patent covers. That is all you bought from Mr. Dutton?

A. The rights and all the assignments that Mr. Stadtfeld had given Mr. Dutton.

(Testimony of William A. Wallace.)

Q. Does this paper, here, and I am referring to Plaintiff's Exhibit 10, mention every right that you purchased from Mr. Dutton? A. Yes.

Q. And you did not purchase anything that is not mentioned in this paper, Plaintiff's Exhibit 10?

A. Not any rights.

Q. You did not purchase anything from Mr. Stadtfeld, as I understand you, he had nothing to sell? A. No.

Q. Did you have any discussion with Mr. Stadtfeld at that time regarding the activities of the Payne Company or his work with the Payne Company, or what the Payne Company had accomplished?

A. No, we were not interested at all in the Payne Company. [332]

Q. How long did you continue to pay Mr. Stadtfeld \$35 a week?

A. I would have to take that from the books.

Q. How long do you think you paid him?

A. I would not think about that, I would have to know.

Q. Was it up to the execution of this agreement in evidence here?

A. He might have received something over that, I think we did give him a raise in wages, and after the patent was secured then we began to pay him royalties.

(Testimony of William A. Wallace.)

Q. Have you continued to pay him royalties ever since August 1, 1935, when this agreement was executed?

A. Ever since the patent was granted and still pay him.

Q. You continued to pay him a salary with the addition of 25 per cent?

A. Of the net profits.

Q. Of the net profits since the patent was issued? A. Yes.

Q. Now, you mentioned a time Mr. Stadtfeld first came to you in 1933, I think it was sometime when you made some aluminum. A. 1932.

Q. When you made some aluminum elbow.

A. I made one.

Q. You made one?

A. I tried to make it, rather.

Q. Do you know who he was working for at that time?

A. I believe it was the Plant & Rubber Company.

Q. That is all you ever made, just one?

A. I tried to make one.

Q. Where do you consider you acquired any right to the trade-mark "Metalbestos"?

A. From the fact that Mr. Dutton had used the name Metalbestos when we first began to manufacture Metalbestos for him and we received orders, and we issued orders in our own shop for production calling for Metalbestos.

(Testimony of William A. Wallace.)

Q. I know, but you knew that Mr. Dutton had not been using it for a long period of time, for over a year?

A. What is the question you want me to answer? You say we knew? [333]

Q. You knew he had not?

A. We knew that he had been using it, yes.

Q. And that it had been in use by the Payne Furnace & Supply Company?

A. No, not at that time, not when the word "Metalbestos" was used first.

Q. I mean you knew that the Standard Asbestos Company had not used it during the time Mr. Payne had used it?

A. No, I don't know that they did not.

Q. You don't know that he did?

A. I think he did.

Q. You have no proof that he did use it, yourself, you don't know that he did, do you?

A. Yes, I would say that he did, because I believe we made up some large sizes for him, I am not sure.

Q. I am speaking of the trade-mark, not the pipe.

A. You are speaking of Metalbestos?

Q. How did you apply it to the pipe?

A. In the form of a stencil form printed on, or something like that.

Q. Did you stencil it on?

(Testimony of William A. Wallace.)

A. We used to have a little marker for it.

Q. What? A. A little paper marker.

Q. A little paper label? A. Yes.

Q. You pasted it on there? A. Yes.

Q. But that was in the fall of 1933, was it not?

A. When we first started to make them it was.

Q. I mean that is all you know, what happened in the fall of 1933?

A. Yes, while we were making it.

Q. While you were making it in the fall of 1933? A. Yes.

Q. Has Mr. Stadtfeld been continuously in your employ up to this time?

A. Yes, he still is.

Mr. Connor: That is all. [334]

Redirect Examination

Mr. Owen: Q. Mr. Wallace, was taking Mr. Dutton's stock off of his hands part of your deal with him to acquire the right to the invention of Mr. Stadtfeld?

A. Yes, the stock he had left.

Q. I understand you took it all off his hands?

A. Yes.

Q. Now, \$800 was mentioned in one question for the stock, that is a different \$800 than was paid to him out of the royalties? A. Oh, yes.

Q. Did you ever see the papers in the application file, or in fact there is no reference numeral—let me ask you ask this: Do you know whether

(Testimony of William A. Wallace.)

an application was ever prepared prior to the one that you had prepared in this invention?

A. Yes, I believe Mr. Stadtfeld, I think it was Mr. Stadtfeld said that they had paid some attorney \$30 to file an application. Whether it was filed or not, I don't know.

Q. Did you ever see the application or the file?

A. I do not recall whether I did or not.

Q. What was the invention that you understood that your company was acquiring from Mr. Dutton in taking over his contract with Mr. Stadtfeld?

A. The invention of the pipe as it is today, namely the aluminum pipe with the air cell asbestos on the outside of the aluminum and then a galvanized jacket over that.

Q. That is what you intended to buy?

A. That is what we bought.

Q. In your position with the plaintiff company how close attention do you pay to the details of running the business?

A. Very little to the details.

Q. Do you pay attention to when stock comes in and what stock is taken over?

A. No, I do not.

Q. What is your business, mainly?

A. Well, keeping all the other heads going and looking after the finances and sales promotion, [335] and the buying of all materials; in other words, more of an executive position rather than in detail.

Mr. Owen: That is all.

(Testimony of William A. Wallace.)

Redirect Examination

Mr. Connor: Q. In your application for registration of trade-mark of "Metalbestos", in a statement sworn to by Mr. Williams you state that the trade-mark had been continuously used in the business of the said corporation, which is the Williams Wallace Company since November 27, 1933. What did that mean?

A. We had been using it in 1933.

Q. You had been using it in what way?

A. Well, we used the word "Metalbestos."

Q. In what way, on what?

A. On any orders going into the factory or any orders that we had received from Standard Asbestos, or transmitting from our office to the factory we used it.

Q. As I understand, you were making this material for the Standard Asbestos Company?

A. That is right, but we used that name in any orders that we would give in to the factory, and in billing it back to the Standard Asbestos Company we would bill it back as Metalbestos.

Q. But it was the trade-mark of the Standard Asbestos Company, was it not, not of the Williams Wallace Company?

A. They did not have a trade-mark at that time.

Q. That is what they called it, however?

A. We received the trade-mark for it.

(Testimony of William A. Wallace.)

Q. You were not using it in connection with any article that you were manufacturing for sale to the public, were you?

A. After we started to make Metalbestos ourselves we used it.

Q. That was in the fall of 1934?

A. Well, we used it in the sale to the Standard Asbestos Company. [336]

Q. But not for your trade-mark, it was their trade-mark, was it not? Didn't the Standard Asbestos Company originate the name? A. Yes.

Q. Then what you mean is——

A. (Interrupting) We used that name.

Q. You used that name as far as writing out an order is concerned, but did you put the labels on the pipe as you made them? A. Yes.

Q. Then instead of being your business it was put on there for the purpose of the Standard Asbestos Company's business, was it not?

A. Well, now, I could not answer that, I do not recall that.

Q. Maybe you can answer and straighten it up this way. The Williams Wallace Company prior to the fall of 1934 was not manufacturing Metalbestos vent pipe for sale to the public, was it?

A. No.

Q. You were making it for the Standard Asbestos Company?

(Testimony of William A. Wallace.)

A. Yes, we were making the aluminum and the outer casing for them.

Q. Prior to the fall of 1934 Williams Wallace Company was not using the trade-mark Metalbestos on any products as its own products which it sold to the public: Isn't that true?

A. I believe it is.

Mr. Connor: That is all.

Further Redirect Examination

Mr. Owen: Q. When you made this deal, this oral arrangement with Mr. Dutton, what was he selling? A. Metalbestos.

Q. Do you remember how he transferred it or how your deal was framed?

A. Well, when I made the deal with him, you mean what he sold?

Q. What was he selling you?

A. He was selling us——

Q. (Interrupting) What rights?

A. The name, the rights, the trade-mark "Metalbestos," and also the invention of this vent pipe.

Q. Those two things?

A. Those two things. [337]

Mr. Owen: That is all.

Further Recross Examination

Mr. Connor: Just a moment, Mr. Wallace. You have testified now that the only thing that you purchased, the only property rights you purchased are specified in this yellow sheet, here, haven't you?

(Testimony of William A. Wallace.)

The Court: That is argumentative, Counsel.

Mr. Connor: It is slightly, your Honor.

Q. You have testified that all of the rights you purchased from Mr. Dutton—

The Court: Now you are testifying. Let us proceed.

Mr. Connor: Q. Do you repeat your answer that all of the rights you purchased from Mr. Dutton are recited in Plaintiff's Exhibit 10?

A. Yes, as related to the Metalbestos as it now stands, both in trade name and the invention and manufacture.

Q. Did you assume that Mr. Dutton still had any property right in the trade name?

A. I did.

Mr. Connor: That is all.

HARRY A. DUTTON,

Called for the Plaintiff in Rebuttal; sworn.

Mr. Owen: Q. Mr. Dutton, will you please give us your age, residence and occupation? A. 66.

Q. And your residence and occupation?

A. Los Altos; my occupation is owner of the Standard Asbestos Company.

Q. How long have you been interested in asbestos and insulating products?

A. Since 1884, when I was a little kid.

(Testimony of Harry A. Dutton.)

Q. Have you, in connection with your business, had any contact with the flue business? A. Yes.

Q. About when did that start?

A. Well, do you mean when I first saw [338] Mr. Stadtfeld?

Q. No, in this flue business, just tell us in general.

A. Throughout the years, ever since gas has been used.

Q. About how many years is that?

The Court: You mean for illumination or heating?

A. Well, since circulating gas heaters have come out and have become very popular, well, probably from about 1926 or 1927 or 1928, I did some work on that.

Mr. Owen: Q. Do you know Jacob A. Stadtfeld? A. Yes.

Q. How long have you known him?

A. Since about 1933.

Q. 1933? A. Yes.

Q. Have you ever had any business relations with him since then? A. Yes.

Q. When were your first relations with him?

A. Sometime about the middle of 1933.

Q. What was the nature of that relation?

A. I decided to manufacture and handle a gas vent pipe, and after some little work I understood that Mr. Stadtfeld was no longer with the Plant

(Testimony of Harry A. Dutton.)

Rubber & Asbestos Company, and that he had gone with the Ace Sheet Metal Works, and knowing the manager of the Ace Sheet Metal Works I approached the manager and asked him what the situation was, and he said he was perfectly clear, if I wanted to do business with Mr. Stadtfeld it was all right with him, and so one thing led to another and Mr. Stadtfeld came over to see me, in about a week or ten days thereafter.

Q. What product did he have when he came over?

A. He had the product which I believe you call Exhibit 4.

Q. That is correct. A. Yes.

Q. Was it substantially in that form at that time? A. Almost identical. [339]

Q. You say he came over. What do you mean?

A. He came to my store on Folsom street at that time and he told me that he was perfectly clear from the Ace Sheet Metal Works, and that he was under no obligation to anyone, and after negotiating several days, in which he made sketches and told me about all of his different plans, and demonstrating to me that this was not an infringement on anything else on the market, I told him that I would back him on it.

Q. Do you remember the terms of the deal that you made with him? A. Oh, yes, I do.

Q. What were they, briefly?

(Testimony of Harry A. Dutton.)

A. We were to pay him not over \$35 a week for a period not exceeding four weeks——

The Court: You are just reading the terms—the paper embraces the terms?

A. Yes, the paper embraces the terms.

Mr. Owen: Q. What did he call the product when he came over from the Ace Sheet Metal Works?

A. He had some tentative name for it, I believe but it was a name I did not like, and if I went ahead with it I thought I could select a better name.

Q. What name did you select?

A. Well, I made a list of a dozen and we all gathered around and sorted out the name Metalbestos.

Q. You started using Metalbestos on the product?

A. Yes, and I used it from that day to this.

Q. Was he an employee of yours?

A. Mr. Stadtfeld?

Q. Yes. A. Yes.

Q. And the invention that you understood you were receiving under this contract of September 2, 1933, was what? A. Exhibit 4.

Q. You mean the type of the invention of the patent in suit? A. Yes.

The Court: That is Plaintiff's Exhibit No. 4.

Mr. Owen: That is your signature to that exhibit?

A. Oh, yes. [340]

(Testimony of Harry A. Dutton.)

Q. Plaintiff's Exhibit 10? A. Oh, yes.

Q. Is that in your handwriting?

A. Yes, all of it except Stadt's signature.

Q. By "Stadt" you mean Stadtfeld?

A. Yes.

Q. Who made the Metalbestos which you sold?

A. The Williams Wallace Company.

Q. Under what sort of an arrangement?

A. The price at first, it was an agreed price for the first little articles that they made for us—after we got out aluminum they made it all up and billed it in a lump sum for the time and material that they consumed in it.

Q. Was the venture successful?

A. No, because the cost of the material was greater than we could sell them for and make a profit.

Q. Because there were too many middle men, is that it?

A. That was the idea; in other words, if I had been in the sheet metal business I could have made a profit, but I could not afford to pay Williams Wallace a profit and get a profit myself.

Q. When you discovered that what did you do?

A. I told Stadtfeld I was going to quit, I limited the time to four weeks, and I think it ran from—is that four weeks or four months—four weeks is it?

Q. How long was he in your employe?

(Testimony of Harry A. Dutton.)

A. I think he was there just roughly three or four months and I told Mr. Stadtfeld that I was going to discontinue; he told me that he thought he could probably get the Payne Furnace & Supply Company, of Los Angeles, interested in it, because they were handling a material called Vitex, which was unsatisfactory, and he wanted to know what proposition he could put up to Payne, and I told him, to the best of my memory, that if Payne Furnace & Supply Company would take all of the goods off my hands, made up, raw material and pay me 25 per cent. I would [341] give them carte blanche, everything I possessed.

Q. What do you mean by everything you possessed? A. Is that what you call Exhibit 10?

Q. You mean the invention? A. Yes.

Q. And the stock?

A. The trade-mark, all the stock, and all.

Q. What did he do then, do you know?

A. I believe he contacted first the San Francisco Branch of the Payne Supply Company, and possibly went down to Los Angeles later; I do not recall all of the details about that, but eventually he came back to me and told me that the Payne Supply Company would take the aluminum, no metalbestos, some aluminum tubing I had there off my hands. I told him I did not want to sell them the aluminum because I would be left then with all of the Metalbestos on my hands.

(Testimony of Harry A. Dutton.)

Q. By "metalbestos" you mean the made-up stock?

A. The made-up material. But Mr. Stadtfeld told me that he thought a little later they would take it all, so I agreed then to sell the aluminum, which I did. I think it amounted to about \$500 or \$600. That was shipped down. As far as I know, as far as my recollection goes, I do not think the Payne Supply Company ever ordered a foot of Metalbestos made up to be shipped to Los Angeles, but the local house did order a few hundred dollars, I believe before the Payne Supply Company got in operation, and I think that was all that they ever took. At the time that this happened I had \$3500 or \$4000 worth of material, and I think the amount of material that the Payne people purchased was certainly less than \$1000. I have not the figures.

Q. Did they take over all of your stock?

A. Never. At the very most I should say they might have taken over 25 per cent. at the very outside.

Q. What did you understand to be the obligation of the Payne Furnace [342] & Supply Company with respect to the stock you had on hand?

A. If they would take all of that stock off my hands I would turn over to them all my right, title and interest to the Metalbestos, Exhibit 10.

Q. The trade-mark and the invention, you mean?

A. Yes.

(Testimony of Harry A. Dutton.)

Q. As I understand your testimony, they did not take it all? A. No.

Q. Were efforts made by you by correspondence to get them to take the stock? A. Yes.

Q. What do you have there with you?

A. As I recall, Mr. Fleming was in to see me several times and I was in to see him, Mr. Fleming being the San Francisco representative of the Payne Furnace & Supply Company, and I asked him to take the stock off my hands, and I think Mr. Stadtfeld was up once to see me, and I wrote back and forth to take it off my hands, and in addition to that I wrote the Payne Furnace & Supply Company to take the stock off my hands, and they replied as late as June, they replied that this order they were sending us was all they could take at that time.

Mr. Connor: Q. What is the date of that?

A. June 14.

Mr. Owen: Q. Did you ever receive any purchase order from them after this letter of June 14, 1934, from the Payne Furnace & Supply Company?

A. To the best of my knowledge and belief I should say no.

Q. Have you examined whatever records you have to see whether there was any purchase by them of complete metalbestos from you after that date?

A. I should say no.

(Testimony of Harry A. Dutton.)

Q. That is there was no purchase: is that what your answer is? A. Yes.

Q. Do you identify these letters which you have been looking at [343] here, those in your hand, as having been written by yourself? A. Yes.

Q. And the letters from Payne as having been received by you? A. Yes.

Q. In this letter of April 6, 1934 you say, "I received this morning an order for the plain aluminum pipe but no order for the \$500 worth of Metalbestos." What was that complaining about?

A. I can only venture—

Q. I want your best recollection.

A. My recollection is that the San Francisco Branch was to get \$500 worth of material, because it says here "I saw Mr. Fleming and he tells me that you were *going get* this item fixed up when you arrived in Hollywood," and I wanted to know why that order did not go through. I thought the order was going through but it was only for half of that much.

Q. Can you ascertain that from any of these orders—you are now looking at the letter of April 9, 1934?

A. That is it, instead of being \$500 it proved to be \$295.

(Testimony of Harry A. Dutton.)

Q. Did you finally, in an effort to get the Payne Furnace & Supply Company to take this stock, make any concession on your original price proposed to them?

A. Yes. Apparently on May 25 I wrote them a letter.

Q. You say apparently. Is that letter in your handwriting? A. Yes.

Q. Did you mail it to them?

A. Yes. I should not have used the word "apparently."

Mr. Connor: What year?

A. 1934. On May 25, 1934 I wrote to them on a certain amount of Metalbestos that I had on hand which cost me \$1257, and offered it to them for \$500 down and the balance \$50 a month until \$850 had been paid, a 33 $\frac{1}{3}$ per [344] cent. discount, but the material was not purchased.

Mr. Owen: Q. It was not taken?

A. No, not taken.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 14 a letter of April 6, 1934, from Mr. Dutton to Mr. Stadtfeld.

The Court: It will be received as Plaintiff's Exhibit 14-A.

(The letter was marked "Plaintiff's Exhibit 14-A.")

Mr. Owen: A letter of April 9, 1934, from Payne Furnace & Supply Company to Mr. Dutton.

(Testimony of Harry A. Dutton.)

The Court: It will be marked "Plaintiff's Exhibit 14-B."

(The letter was marked "Plaintiff's Exhibit 14-B.")

Mr. Owen: A letter of May 22, 1934, from Payne Furnace & Supply Company to Mr. Dutton.

The Court: 14-C.

(The document was marked "Plaintiff's Exhibit 14-C.")

Mr. Owen: A letter of May 24, 1934, from Mr. Dutton to Mr. Stadtfeld.

The Court: 14-D.

(The letter was marked "Plaintiff's Exhibit 14-D.")

Mr. Owen: A letter of May 25, 1934 from Mr. Dutton to Mr. Stadtfeld, with a yellow sheet and white sheet attached to it, as 14-E.

The Court: So marked.

(The letter was marked "Plaintiff's Exhibit 14-E.")

Mr. Owen: A letter from Payne Furnace & Supply Company dated June 14, 1934, to Mr. Dutton, as 14-F.

The Court: So ordered.

(The letter was marked "Plaintiff's Exhibit 14-F.")

Mr. Owen: Q. Mr. Dutton, did you or did you not agree to sell the invention and the trade-mark

(Testimony of Harry A. Dutton.)

to Payne Furnace & Supply Company if they took only a part of your stock? A. No. [345]

Q. At any time? A. No.

Q. Now, you purchased from them from time to time Metalbestos, did you?

A. After they took on Mr. Stadtfeld sizes that I did not have in stock, yes.

Q. You mean this invoice to you, here, of the Payne Furnace & Supply Company was for sizes that you did not have in stock?

A. That is right.

Q. Did you continue in the business then?

A. Yes.

Q. On what basis?

A. Just the same basis as I had been going, I kept on selling Metalbestos, and when I was short any sizes I thought it would be diplomatic to order it from Payne Furnace & Supply Company as long as I was going to sell them all of this material, to them eventually; otherwise I would have placed the business with the Williams Wallace Co. As it was, I think every month I purchased something from Williams-Wallace.

Mr. Owen: I offer in evidence the acknowledgment of order from Payne Furnace & Supply Company to Standard Asbestos Company. It is an order dated August 27, 1934, for Metalbestos vent pipe and other associate products, as Plaintiff's Exhibit 15.

(Testimony of Harry A. Dutton.)

The Court: So ordered.

(The document was marked "Plaintiff's Exhibit 15.")

Mr. Owen: Q. What do you recall happened next with relation to Mr. Stadtfeld after he went South with the Payne Company?

A. Why, after remaining down there several months he materialized again in San Francisco.

Q. Did he come to see you?

A. I do not know whether he saw me before he saw Williams-Wallace or not.

Q. Well, what happened then? Did anybody approach you at about the time that Mr. Stadtfeld returned to San Francisco?

A. Yes, on or about that time Mr. Wallace came to see me.

Q. Mr. Wallace?

A. Mr. Wallace, of the Williams-Wallace Company [346] came to see me and wanted to know the details of the deal that I had with Stadtfeld.

Q. Do you remember what you told him?

A. And I told him that if he would take this material off my hands and if and when a patent was issued that he would return to me all of the money that I had been out I would assign to him my right, title and interest.

Q. What right, title and interest did you understand you had?

(Testimony of Harry A. Dutton.)

A. Whatever right I possessed in Exhibit No. 10.

Q. You mean right to the invention and right to anything else?

A. I can only say whatever right I possessed I was willing to let Mr. Wallace stand in my shoes.

Q. They stepped into your shoes?

A. That is right.

Q. Up to that time had Payne Furnace & Supply Company performed their agreement with you?

A. No.

Q. Do you remember about how much stock of Metalbestos you had on hand at that time?

A. What date are you talking about?

Q. At the time that you made your deal with Mr. Wallace.

A. I probably had about \$1200 or \$1500 worth.

Q. Well, now, when you told Mr. Wallace about your willingness to dispose of those rights in the patent and the mark, what was done about it—anything?

A. Why, Mr. Wallace said that he would take it under consideration, or something like that, and then if he got together with Mr. Stadtfeld and decided to go ahead, that he would still fill his part of the agreement.

Q. Then did you enter into an agreement with Mr. Wallace?

A. A verbal one. I simply took Mr. Wallace's word. He was general manager of a large concern,

(Testimony of Harry A. Dutton.)

and I was the manager of a small concern, so we took our word for that. I did not have much to give unless I had a patent. If I had a patent I thought it was [347] worth something to Mr. Wallace.

Q. Did you ever mention this deal to Mr. Stadtfeld? Did he understand what the deal was?

A. I do not recall. I know if he asked me I told him. Whether he ever asked me I don't know.

Q. Do you know where the \$800 that was to be paid to you was to come from? A. Yes.

Q. What was that to come out of?

A. That was to come out of Mr. Stadtfeld's one-third or one-quarter profit, or whatever it was.

Q. To be paid to him when?

A. Paid to him when the patent issued.

Q. I hand you a letter dated July 11, 1935—the letter shows June and July—is that anything you have ever seen before?

A. Why, this is all in my handwriting.

Q. Will you glance at that and tell me what you meant that letter to accomplish? A. Yes.

Q. What was it?

A. That was to inform Williams-Wallace of the amount of material that I had on hand at that time.

Q. That was about how long after you had talked to Mr. Wallace?

A. I don't recall, it must have been four or five months.

(Testimony of Harry A. Dutton.)

Q. Do you remember the date, approximately, of your talk with Mr. Wallace with respect to taking over all of your rights to the Metalbestos?

A. I believe sometime in the fall of 1934.

Q. This is June, 1935. A. Yes.

Q. Will you look at that material list attached to the letter and tell me whether or not that is the complete stock, or is it just plain aluminum stock, or component material?

A. It is practically all complete stock.

Q. Was that stock that you had on hand at the time that Mr. Stadtfeld went south with Payne?

A. No.

Q. Where had that stock come from? Who had manufactured that stock? [348]

A. Williams-Wallace in 1933—this is some of the stock that still remained.

Q. Probably you did not understand my first question. Is this stock shown on this list attached to that letter, stock that Payne should have taken off your hands if they had gone through with their deal? A. Yes.

Mr. Owen: I offer in evidence the letter on this stock dated June 11, 1935, with one sheet attached, as Plaintiff's Exhibit 16.

The Court: So ordered.

(The document was marked "Plaintiff's Exhibit 16.")

A. Is it all right for me to give an explanation?

The Court: He is putting in his case.

(Testimony of Harry A. Dutton.)

A. The attorney asked me if that is what Payne had agreed to take off my hands, and that is what remained of what should have been taken off my hands.

Mr. Owen: Q. You mean you tried to sell as much as you could that was left after what they had taken? A. This is the tail end.

Q. That means that you tried to dispose of it when they did not take it?

A. Yes, I sold that.

Q. Do you know Don Fleming? A. Yes.

Q. I believe you testified that he had talked with you. A. Yes.

Q. He is connected with the defendant, is he?

A. I believe he is the San Francisco Branch Manager of the Payne Furnace & Supply Company.

Q. After selling your rights in Metalbestos and trade-mark to Williams-Wallace did you have any contact with him? A. Yes.

Q. Do you remember what that was and where it took place and when?

A. I could not tell you when but he dropped in to see me several times and wanted to know what I had done with my Metalbestos business. [349]

Q. Was this before or after you sold it to Williams-Wallace?

A. I am talking about after I had sold it to Williams-Wallace.

Q. Do you remember what was said at that conversation?

(Testimony of Harry A. Dutton.)

A. Oh, no, not exactly. I thought that Mr. Fleming was fishing for information, and I was backing up and down, not wanting to give him any.

Q. Who were you trying to assist in that?

A. I don't know as I was trying to assist anyone in particular, only that the patent had not been issued yet and I didn't know but what something might happen to impair the chances of a patent being issued.

Q. Now, when you conveyed the rights to Williams-Wallace Company by this oral agreement about which you have testified, what did you understand that you were conveying to them?

A. Just as I answered before, everything.

Q. What rights did you have?

A. Whatever right there was in that yellow piece of paper. I assumed that I had a right, if the patent was issued, to own it.

The Court: Q. In other words, it was your impression you were to receive a right to a patent should it be later issued? A. Yes.

Q. Anyway, you were getting all the rights that the man who signed with you had: is that correct?

A. Yes, we both signed it on that yellow piece of paper and if that does not mean anything I did not have anything.

Mr. Owen: Q. After you went into the business after you had gotten Plaintiff's Exhibit 10 you originated the name Metalbestos? A. Yes.

(Testimony of Harry A. Dutton.)

Q. Did that also go to the Williams-Wallace Company by that oral agreement?

A. Yes. Mr. Wallace did not recall that when he was on the stand, but he particularly asked me whether or not there [350] was any objection if they continued with the use of Metalbestos, and I told him possibly not, as long as he did not object to my using it.

Q. Do you use it now? A. Yes.

Q. On pipe that you make up?

A. Yes, except I make up no pipe.

Q. Where do you get it?

A. I buy it from Williams Wallace.

Q. Then you sell Metalbestos made by them?

A. Yes, that is correct.

Q. Is that what you mean when you say so that you could use it? A. Yes.

Q. Do you know Mr. E. L. Payne?

A. Yes.

Q. Where did you meet him?

A. He came to my office.

Q. When?

A. Sometime in the spring of 1935.

Q. Was he alone?

A. No. He had Fleming with him.

Q. You mean Don Fleming? A. Yes.

Q. Were you alone?

A. To the best of my recollection I was; there might have been some stenographer in the room.

(Testimony of Harry A. Dutton.)

Mr. Owen: If your Honor please, I have one witness here who could only get away for a few minutes. Could I ask to put him on? It is only as to records.

The Court: Can't you stipulate as to the records?

Mr. Owen: I think I may be able to. It is stipulated between counsel that on the following dates the Plant Rubber & Asbestos Company purchased from Pacific Metal the following material:

On February 23, 1933 for \$26.09 24½ pounds of No. 34 gage 24 x 72 sheared to 11½ x 36 inches, and also one piece of 24 gage 12 inches x 72 inches;

On February 28, 1933, for \$4.85, 5 pieces of No. 34 gage 24 x 72 inches.

On March 9, 1933, for \$9.45, 12 pieces 28 gage 36 x 120, which was cut to 17½ by 36 inches, 3 pieces of 28 gage 17½ x 36 inches. [351]

On March 14, 1933, 1 sheet 30 gage 30 x 96 inches cut to 14¼ x 37.

April 1, 1933, 2 pieces of 26 gage 36 x 120. No cutting.

On April 7, 1933, for \$18.54, 4 sheets 36 x 120 inches, 26 gage and 1 piece 4 inches O.D. round tubing by .065, 36 inches long.

On April 12 for \$16.10, 4 sheets of 26 gage 36 x 120.

On April 18, for \$10.72, 1 piece 3-inch aluminum pipe 6 feet long.

(Testimony of Harry A. Dutton.)

On May 15 1 piece 3-inch aluminum pipe 6 feet long.

On May 18 24 feet 3-inch tubing in 12-foot lengths.
1 piece 28 gage 24 x 72.

On May 25 10 sheets of 28 gage 36 x 120.

Mr. Connor: As I understand counsel, the stipulation you asked for was that those are the facts the witness would testify to if called?

Mr. Owen: Yes, and that this is aluminum stock. [352]

Saturday, March 5, 1938.

HARRY A. DUTTON,

Direct Examination

(Resumed).

Mr. Owen: Q. When we concluded yesterday afternoon, Mr. Dutton, you testified that in the spring of 1935 Mr. Payne, accompanied by Mr. Don Fleming, came to see you.

A. Yes, they came to 746 Folsom street.

Q. That is, to your place of business?

A. Yes.

Q. What conversation took place at that meeting?

A. Mr. Payne wanted to know what disposition, I believe, I had made of my material and my patent rights and things and I told him I had disposed of them.

Q. I mean with reference to Metalbestos.

(Testimony of Harry A. Dutton.)

A. With respect to Metalbestos, whether I told to whom I had disposed of it I do not recall, but Mr. Payne told me at the time that he had not been particularly interested in the application for the patent, because he had been informed by an attorney that the patent application would never go through.

Q. Did he say why he had become suddenly interested in it? A. No.

Q. Did he have anything else to say to you at that time? A. I believe not.

Q. How long was he there, do you remember?

A. Oh, a short time, probably fifteen or twenty minutes or half an hour, something like that.

Q. Do you remember anything else of that conversation?

A. Nothing of any import at this minute that I think of.

Q. Did he ask you how much stock you had left on hand that he had not taken over?

A. Yes, he did.

Q. Did you tell him?

A. I told him that I had a considerable [357] stock.

Q. Did he offer at that time to take it over?

A. No.

Q. You don't remember whether you told him who had bought the patent rights and the trademark?

A. I don't recall whether I told him or not.

(Testimony of Harry A. Dutton.)

Q. You testified, Mr. Dutton, that you had been in the asbestos insulating business for many years. Do you know the absorption rate of asbestos insulation?

Mr. Connor: Objected to as immaterial, irrelevant, and incompetent, and not tending to prove any issue in this case.

Mr. Owen: It goes to the question of invention and lack of applicability of some of the prior art references which have been set up by way of anticipation, to show that these structures are not practicable. This is a man who had experience with the action of asbestos, and I think we are entitled to take that evidence.

Mr. Connor: I think the Court can take judicial notice that asbestos will absorb moisture. There is no question about that, if that is all you are getting at. I do not think the rate is material.

Mr. Owen: I won't ask, if you are willing to concede——

The Court: He concedes that it will absorb moisture.

Mr. Owen: Q. What happens when asbestos drinks up the water?

A. The weight of the asbestos is increased.

Q. Then what happens to it, where it is in between two walls, if it becomes wet?

Q. There is no insulation on the market that is of any value if it becomes wet.

Q. Keeping it dry is the problem?

(Testimony of Harry A. Dutton.)

A. It must be dry.

The Court: Q. It ceases to insulate?

A. It ceases to insulate whenever it becomes wet; in other words, there is practically no insulation on the market worthy of the name that will not absorb [358] at least 80 per cent. of its weight of water.

Mr. Owen: Q. Taking this metalbestos, if it were to get wet what would happen to it?

A. Its popularity as an insulator would be ruined.

Q. You have had, I believe you testified, a long experience with flue pipes. What is your measure of an ideal flue pipe, what is the problem?

A. The problem of an ideal flue is, first and foremost, to have an insulator on there in order that the heat inside of the flue may be so great at all times that no moisture is capable of being formed inside of that flue, so there would be no acid or anything running down inside of that flue; it must create heat quickly and create a draft. In addition, to be practicable, it must be of such a construction that it can be very quickly and rapidly set up, because you are sending this material all through the country to people who are not familiar with setting up flues, and the construction of this principle is about the same as putting up a stovepipe; in fact, any man or child in the country knows how to put a stovepipe together; but even so, the star feature about that metalbestos is what makes it what it is, that you can slide the inner tube a fraction of an inch.

(Testimony of Harry A. Dutton.)

Q. For what purpose?

A. So that you can couple them together. I have made numbers of flue parts in the past, but I was always stumped when I came to getting them together; there was practically no way to get them together so as to keep the moisture out from the joint.

Q. Are you familiar with the product known as Vitex? A. Yes.

Q. Did you ever sell and use any of it?

A. Yes.

Q. Was it successful? A. No.

Q. Were you acquainted with the product known as transite? A. Yes. [359]

Q. Was that successful?

A. It was being sold very largely but I should say it was not as successful for flue pipe.

Q. What is the reason for that?

A. Because it is not an insulator.

Q. It is not an insulator? A. No.

Q. What happens in transite?

A. They cannot get the gases inside heated enough so as to create a proper draft; in other words, you can get heat on the inside of Metalbestos in excess of 150 degrees, hotter than you can in any other flue on the market.

Q. How long has the market existed for a good metal flue?

A. About 12 or 15 years, I guess.

(Testimony of Harry A. Dutton.)

Q. Prior to Mr. Stadtfeld bringing Metalbestos to your attention had you ever seen anything like it before? A. No.

Q. Did you know at the time Mr. Stadtfeld came to you anything about his financial condition?

A. No.

Q. Did you know anything about it subsequently or before?

A. Yes. In other words, he told me that he had no funds, if that is what you mean.

Q. Going back to this visit of Mr. Payne to you, was anything discussed with him about his agreement in connection with your stock?

A. There might have been.

Q. Do you recall anything that was said about his agreement?

A. I believe I told him that if he had taken all of my stock that I understood he was to take that I would have turned over everything that I possessed and the present dog fight would not have been in existence.

Q. You told him that at the time?

A. That is to the best of my recollection. That was the upshot of the conversation.

Q. He did not offer at that time to take what you had left on hand? A. I think not. [360]

Mr. Connor: I understand, Counsel, you are referring to the period in the spring of 1935?

Mr. Owen: Yes. You may cross-examine.

(Testimony of Harry A. Dutton.)

Cross Examination

Mr. Connor: Q. I understand, Mr. Dutton, that Mr. Stadtfeld first approached you in the summer of 1933 regarding this vent pipe?

A. I approached him.

Q. How did you approach him?

A. Personally.

Q. Well, I mean on what basis, what was the arrangement?

A. I was anxious to enter into the flue pipe business at that time for a lot of reasons that do not concern us here. I was told that Mr. Stadtfeld was free, that he had been with the Plant Rubber & Asbestos Works and his services were available, so I contacted Mr. Stadtfeld.

Q. Where did you seek him out?

A. I was told that I could find him up at the Ace Sheet Metal Works.

Q. The reason I asked you this, I understand that Mr. Stadtfeld had approached you. It is a fact that you sought him out at the Ace Metal Works? A. Yes.

Q. What was your first conversation with him? I am asking that question because I understood so far that was the first time you had heard of this vent pipe. A. Yes.

Q. Am I correct there? A. Yes.

Q. What was the substance of that first conversation with Mr. Stadtfeld?

(Testimony of Harry A. Dutton.)

A. To begin with, when I approached him, I did not know that he had a vent pipe, at all, but I was interested in getting his assistance to help me get out something.

Q. A vent pipe? A. Yes.

Q. What did he tell you when you approached him?

A. I first approached him, and I thought he was connected with the Ace Sheet [361] Metal Works, and he said it is rather a temporary arrangement that I have with these people, and I spoke to Mr. Derbyshire, who was manager of the Ace Sheet Metal Works, and told Mr. Derbyshire I did not want to disturb his relationship with Mr. Stadtfeld, and he said, "It is all well and good, go right ahead, I am about ready to cancel it anyway." So I told Mr. Derbyshire to have Mr. Stadtfeld come down to my place and we would talk it over, and I think two or three or four days later he came down to my office and brought this sample along.

Q. Is that the first time you had ever seen the vent pipe? A. Yes.

Q. What did Mr. Stadtfeld tell you about the vent pipe at that time, about his development of it?

A. He told me he had been working on it and this is what he had.

Q. Was the sample just like the finished pipe you see here in court?

A. For practical purposes, identical with what you call Exhibit 4.

(Testimony of Harry A. Dutton.)

Q. His statement to you was that was his first production of vent pipe, the first piece he had produced, or the first sample that he had produced?

A. I don't know whether he told me that or not.

Q. Did he tell you he had been manufacturing it previous to that time?

A. No. He told me that he was trying to get the Ace Sheet Metal Works to develop it and—oh, yes, he did; he told me he had that, which I did not know at that time, that the Plant Rubber & Asbestos Works decided not to go ahead with it, because their chemist had reported that the fumes would eat up the aluminum inner lining, so he had left the Plant Rubber & Asbestos Works and gone over to the Ace Sheet Metal Company, and, incidentally, that is why Mr. Derbyshire would not continue with it, because he got reports from the Plant Rubber Company that [362] the aluminum inner coil would be completely destroyed by acid. So before I went into it I checked on it and had my son, who was an instructor of chemistry at Stanford University—I sent it all down to him, and with all the facilities they had there, he went through every step and reported to me as long as the acid in the condensate would never exceed 6 per cent. out of that, it would be perfectly safe for aluminum, and when I got that report I went ahead with Mr. Stadtfeld.

Q. Do I understand you to refer to aluminum foil?

A. No, the aluminum 28 gage.

(Testimony of Harry A. Dutton.)

Q. The pipe? A. The pipe.

Q. What impressed you most about the vent pipe, the fact that you were using aluminum as an inner pipe and insulating?

A. No, there was just one feature that impressed me as something that I had never been able to solve in all the work I had done, I did not care whether that inner shell be galvanized iron or what not, but I had never been able to get them together. I had never thought of the idea of having that inner tube slidable. As soon as I saw that I was delighted.

Q. You say that you sent samples down to Stanford University to have the aluminum tested?

A. Yes.

Q. Did you have any interest in the fact that an aluminum tube was used at all, weren't you interested in that fact at that time?

A. No, I would have used any tube inside that resisted acid, but aluminum is the cheapest thing on the market that would resist acid. Copper, brass and all of those things are eaten out quickly by acid.

Q. You were then impressed with the fact that aluminum was superior to galvanized iron, weren't you?

A. Certainly, but if you had any other metal in there it would have been the same to me, [363] provided it would resist acid.

Q. That is, such as copper? A. No.

(Testimony of Harry A. Dutton.)

Q. Or monel metal?

A. Monel metal, yes, but that is prohibitive in price.

Q. Then you were impressed with the inner aluminum pipe because it was the cheapest sort of thing in the market that would resist acid. That is the fact that impressed you, is it not?

A. I would not say I was particularly impressed with it, because I would have used anything else if it would have stood it.

Q. I understand this memo of September 2, 1933 is the agreement that you and Mr. Stadtfeld entered into, that is Plaintiff's Exhibit 10? A. Yes.

Q. Now, had you done anything at all with respect to manufacturing or selling vent pipe prior to the making of the agreement Plaintiff's Exhibit 10?

A. I do not recall that we had actually sold any, but he had worked around with and probably had gotten some samples made, or something of that nature. I do not recall those details.

Q. How soon after September 2, 1933 did you actually make any sales of this Metalbestos vent pipe?

A. If that is a point that is absolutely important I could get records possibly in my office, but I should say probably within thirty days, probably less.

Q. Well, then, would you say the latter part of October, sometime between the 20th and 30th?

(Testimony of Harry A. Dutton.)

A. I should say before that.

Q. Would you say as early as September 15?

A. Possibly.

Q. Actual sale to the public?

A. I say possibly, but as I said before I think I could probably dig up our records on that if it is important.

Q. How long did you and Mr. Stadtfeld work together under this agreement in the manufacture and sale of vent pipe?

A. Until he went down to see you, until he went down to see Mr. Payne. [364]

Q. Now, you have previously testified that under this agreement that you will pay him \$35 a week for four weeks, and that he was with you for perhaps a period of three months. For what period of time did you pay him \$35 a week?

A. From the time that he came with me, which was probably three weeks or a month before that, until he left to go down to the Payne Furnace & Supply Company, I should say five or six months, something like that.

Q. The record shows that he went down to the Payne Furnace & Supply Company or Mr. Payne I think in the early part of 1934, sometime in January and February. What work was Mr. Stadtfeld to perform under or pursuant to this agreement, Exhibit 10?

A. He had carte blanche to do anything, he had complete permission to do anything that he desired

(Testimony of Harry A. Dutton.)

to do, because I was busy with my asbestos material, in other words, I told Mr. Stadtfeld that it was——

Q. (Interrupting) His child?

A. His child, yes, and that it was up to him to work out all of the details of it and do all of the ordering and selling and look to everything connected therewith. So why this time ran over four weeks is because it took us nearly sixty days or more before we could get aluminum out from the East. In the meantime we continued our activities.

Q. This agreement provides that the profit and loss of the business was to be divided on a one-third basis to Stadtfeld and two-thirds to you. That is, you entered into a sort of partnership arrangement and Mr. Stadtfeld was to take complete charge of having it approved by the various communities and supervise the manufacture and sale of it: is that it?

A. Yes.

Q. That relation continued until Mr. Stadtfeld made his arrangement with the Payne Furnace & Supply Company? A. It did.

Q. In making these arrangements with the Payne Furnace & Supply Company Mr. Stadtfeld acted as your representative, as a partner [365] in this business, that is, he communicated with you as to what your desires were, etc.?

A. Well, he was not a partner of mine, at all.

Q. He was carrying on all the negotiations for the transfer of the business to the Payne Company,

(Testimony of Harry A. Dutton.)

and for the purchase of the stock by the Payne Company?

A. After he went down to see you people he was no longer in my employ.

Q. After he entered the employ of the Payne Furnace & Supply Company he was not?

A. There was a period there that he was not with anyone.

Q. He was not being paid a salary?

A. No.

Q. But he was acting pursuant to the agreement with you, was he not?

A. He was not connected with me at all after the time when we paid him the last week's salary, and he did not know what he would do, and about a week or ten days later he came back and said he thought he could dispose of this stock to the Payne Company, and he said "What kind of a basis shall I put up to them?" And I told him that he was privileged to tell the Payne Furnace & Supply Company if they took my entire stock of Metalbestos and my unmanufactured material, plus 25 per cent. profit that I would ship it all to them and assign to them this Exhibit No. 10.

Q. Wasn't that 15 per cent. instead of 25 per cent.?

A. I would not be positive on that subject, I have not any record of what I said in this conversation, it was never put down on paper, as far as I remem-

(Testimony of Harry A. Dutton.)

ber, but I know that is what I would normally have said, about that.

Q. In other words, you did give Mr. Stadtfeld authority to negotiate the whole deal for you, did you not, that is, for what interest you had in it?

A. I told him about it, but I would not have negotiated any deal unless he had taken it up with me. [366]

Q. That is what I am getting at, he had taken the matter up with you, had he not?

A. Before he left?

Q. Yes, before he left? A. Yes.

Q. Now, when did you decide that you did not want to go ahead with the manufacture and sale of this vent pipe, when did you decide that you wanted to sell out and quit the business entirely?

A. Just as soon as I got the invoice from Williams Wallace Company for this material.

Q. About how soon was that?

A. Approximately sixty days after September 2. The exact date could be determined from Williams Wallace Company's invoice.

Q. Approximately around the first of November, would that be? A. It might be.

Q. When you got this invoice from Williams-Wallace? A. That is the exact date.

Q. That is when you quit? A. Yes.

Q. Can you produce that invoice from your records?

(Testimony of Harry A. Dutton.)

A. If I cannot I am sure Williams-Wallace can.

Q. Will you make a search of your records and at the next session of court produce it here? I will ask the Court to direct the witness to produce that invoice.

The Court: I do not know that we will not finish.

Mr. Connor: I mean if we run over.

Q. Now, do you recall when you gave your last order for material to Williams Wallace Company under this arrangement Exhibit 10 with Mr. Stadtfeld?

A. We had been buying from Williams Wallace continuously.

Q. I mean in connection with the manufacture of Metalbestos, I am not speaking now of pipes manufactured by Williams Wallace, I am speaking of your manufacture.

A. I never manufactured any. [367]

Q. Who did? A. Williams Wallace.

Q. Do I understand Williams Wallace made the Metalbestos for you and Standard Asbestos Company?

A. We simply put in the asbestos, because that is what we handled.

Q. But you ordered the tubes to be made by Williams Wallace, did you not? A. Yes.

Q. That is, for your product? A. Yes.

Q. During the time that Williams Wallace was making tubes for you Metalbestos was a product of the Standard Asbestos Company, was it not?

(Testimony of Harry A. Dutton.)

A. Yes.

Q. And when did you discontinue the manufacture of this vent pipe as a product manufactured and sold by the Standard Asbestos Company?

A. I don't think we ever discontinued it.

Q. There must have been some stage where you discontinued. You testified you intended to stop. When did you do that?

A. I intended to stop pushing this whole affair as soon as I got the invoice from Williams Wallace, because it was at such a price that I could not afford to sell the material at a profit.

Q. Then when did you stop doing that, buying pipe from Williams Wallace and building the vent pipe, when did you stop that?

A. I don't think I ever stopped.

Q. Just a moment. There must have been some place where you stopped, because you have already testified you stopped.

A. I decided to go out of the Metalbestos business right then and there, but I have been in it, and I kept getting orders, and whenever I got those orders I would have Williams Wallace, if I did not have it in stock, make up this pipe and send it up to me, and I would put the asbestos in.

Q. Then do you consider that you have operated under this agreement with Mr. Statdfeld whereby he was to receive one-third of the [368] profits and you were to receive two-thirds of the profits up to the present day?

(Testimony of Harry A. Dutton.)

A. No, up to the date that I assigned my right, title and interest in Exhibit 10 to Mr. Wallace.

Q. During all this period of time has Mr. Stadtfeld shared in the net profits of the manufacture and sale of this vent pipe? A. No.

Q. Well, then, when did the provisions of Exhibit 10 cease to apply?

A. When I disposed of it to Mr. Wallace.

Q. Then Mr. Stadtfeld has been under this agreement in a position to share in the profits or losses of that business until you made your deal with Mr. Wallace?

A. He was in a position to share in the profits but there were no profits. That is the only reason he did not share.

Q. Were there any losses? A. Yes.

Q. Did he share any of your losses?

A. I did.

Q. Will you tell me, if you can, when this Exhibit 10 ceased to apply in regard to Mr. Stadtfeld?

A. When I sold it Williams Wallace.

Q. Otherwise Exhibit 10 was effective throughout that entire period?

A. I should say yes.

Q. That is in so far as anything had to do with the business was concerned?

The Court: He answered that yesterday. Proceed.

Mr. Connor: Q. When did you first start using the trade name Metalbestos on this pipe?

(Testimony of Harry A. Dutton.)

A. Prior to September 2.

Q. And in what form did you apply it to the pipe?

A. On a little printed label.

Q. Who printed the labels for you?

A. I don't know.

Q. Can you find out from your records who printed the labels for you?

A. I doubt it.

Q. Who does your printing ordinarily, or at that time who did it? [369]

A. I don't think I would have it. Some of the first ones we put it on with a rubber stamp and then later I think we had some on there with a paper label. Whether we put those on or Williams Wallace I don't recall.

The Court: You mean something that had printing on?

A. Yes.

Q. You do not mean a stencil?

A. No, a paper that was put on.

Q. That is put on by a stencil?

A. Yes, but we put some on with a rubber stamp and then later a paper label. I would have got it fixed up in an elaborate manner if I had been going ahead with it.

Mr. Connor: Q. You said that the Payne Furnace & Supply Company agreed to take all, every bit of the material you had on hand, off of your hands when this first arrangement was made?

A. No, I did not state that they had agreed to do that. I said that I did tell Mr. Stadtfeld that if

(Testimony of Harry A. Dutton.)

they would do that I would turn it over. I do not think he ever agreed at any time to take it off my hands. When Mr. Stadtfeld returned from Los Angeles and saw me he said "We can take the aluminum tubing right now." I did not want to give him the aluminum tubing because I felt that I would never be able to dispose of the Metalbestos, but he was rather sanguine and thought that Payne would take it all off of my hands. So very reluctantly I shipped down the aluminum tubing and to the best of my recollection they never took down at Los Angeles any, although there were a few hundred dollars worth delivered to the San Francisco Branch.

Q. I will show you Defendant's Exhibit 10-AW, a letter dated February 28, 1934, and ask you to read that and see if that contains the arrangement.

A. I should say it was. This called for only plain aluminum pipe, \$517.

Q. Was that the arrangement that Mr. Stadtfeld was authorized to [370] make with the Payne Furnace & Supply Company, as far as you were concerned?

A. He came back and wanted to know if I would ship them that amount of material at the prices shown there, and I did.

Q. And the Payne Company purchased that quantity listed here, that is, plain aluminum pipe and fittings?

A. Yes, but no Metalbestos.

(Testimony of Harry A. Dutton.)

Q. No complete pipe, you mean, when you say "Metalbestos" you mean by "complete" with the asbestos in it? A. Like Exhibit 4.

The Court: Q. When that was assembled?

A. It was quite a ways from being assembled, because it required asbestos and required the galvanized iron, and Mr. Payne manufactured galvanized iron so he did not want to pay me the price of galvanized iron; he was willing to take the aluminum.

Mr. Connor: In this letter it is stated that the above prices are based on those charged by the Williams Wallace Company, plus 15 per cent. Isn't that the arrangement you agreed to make, 15 per cent. instead of 25 per cent.?

A. It is based on whatever is stated there.

Q. The deal was later carried on whereby the San Francisco office took certain of the complete pipes and later on the Payne Furnace & Supply Company purchased some made up pipe from you, didn't they, that you still had on hand?

A. After repeated requests on the Payne Furnace & Supply Company to take over the balance of my stock I finally received an order for \$200 or \$300 worth to be delivered to the San Francisco office, which I did.

Q. When did you request the Payne Furnace & Supply Company to take over the balance of your stock? A. I don't know.

(Testimony of Harry A. Dutton.)

Q. Have you any record of any letter or communication that you sent to them requesting that they take any further materials off [371] your hands?

A. I think we must have letters in which we insisted that they take the balance of the stock.

Q. Can you produce those letters or carbon copies of them? A. I doubt it.

Q. Do you remember about when that was?

A. Well, it was shortly after the aluminum had been sent, probably a month, maybe sixty or ninety days. I think I wrote them several times.

Q. You did receive further communications from Mr. Stadtfeld, did you not, regarding further purchases of—

A. (Interrupting) Material.

Q. Of made up pipe you had on hand?

A. Of Metalbestos?

Q. Yes.

A. Yes; that was delivered to the San Francisco Branch.

Q. That material that is referred to in the letters of April 9, 1934 and May 22, 1934, Plaintiff's Exhibits 14-B and 14-C, respectively—are those materials referred to in those letters? A. Yes.

Q. You did receive payment for those materials at a later date? A. Yes.

Q. Now, in the meantime, between the time you first made this arrangement with the Payne Fur-

(Testimony of Harry A. Dutton.)

nace & Supply Company, that is the arrangement that Mr. Stadtfeld made in your behalf, and the Payne Furnace & Supply Company had taken certain materials off of your hands, you say that you had continuously sold Metalbestos pipe since that time?

A. I sold Metalbestos every month since I got into it; I sold it out of my stock whenever I had it, whenever I did not have stock I bought it of Williams Wallace, except once I think I bought some from the Payne Furnace & Supply.

Q. For special jobs, was it not? A. Yes.

Q. That is the same way with what you purchased from the Williams Wallace Company for special jobs? A. Yes.

Q. That is, when you did not have the size in stock? A. Yes. [372]

Q. Otherwise, the sales have been made out of stock that remained on your hands that you eventually turned over to Williams Wallace Company?

A. Yes.

Q. Was that the same stock that you had in your shop at the time Mr. Payne and Mr. Fleming called on you in the early part of 1935?

A. Yes.

Q. That was the remainder of what you had on hand at the time you first made your deal with the Payne Furnace & Supply Company?

A. Yes.

(Testimony of Harry A. Dutton.)

Q. Aside from purchases from the Payne Furnace & Supply Company of Metalbestos of theirs or from Williams Wallace, their Metalbestos purchased for special jobs, you never had made up any further Metalbestos to put in stock? A. No.

Q. That is, your own stock of Metalbestos?

A. Right.

Q. Now, how much, approximately, about how much pipe did you have on hand during the period from the time Mr. Stadtfeld went to the Payne Furnace & Supply Company until you made your deal with the Williams Wallace Company?

A. I can answer by saying that when Mr. Stadtfeld left me to go to Los Angeles I had possibly \$3500 in stock, and when I finally disposed of it to Williams Wallace I had about \$1500 worth, and the balance was peddled off during the interim.

Q. When you say stock you mean made up complete Metalbestos pipe?

A. Anything that I purchased from either the Payne Furnace & Supply Company or Williams Wallace after the initial order was sold right out.

Q. For special jobs, purchased specially for particular jobs? A. Nothing came into my place.

Q. Did you ever make an offer to the Payne Furnace & Supply Company to dispose of the stock that you had on hand at cost less 25 per cent.?

A. I never made any offers to the Payne Furnace [373] & Supply Company directly, as I re-

(Testimony of Harry A. Dutton.)

member it, unless it might have been to Don Fleming, he and I talked it over a number of times.

Q. All of the dealings you had with the Payne Furnace & Supply Company were carried on through Mr. Stadtfeld, were they not?

A. The dealings with the Payne Furnace & Supply Company of Los Angeles were carried on through Mr. Stadtfeld after he got down there; then after Mr. Stadtfeld went to Los Angeles I addressed letters to the Payne Furnace & Supply Company, but they were usually answered by Mr. Stadtfeld, I think.

Q. You directed your communications directly to Mr. Stadtfeld, did you not, regarding purchases of stock you had on hand at all times?

A. I won't say that, but if there was any variation in it, I might have written a letter to J. A. Stadtfeld, care of Payne Furnace & Supply Company, or Payne Furnace & Supply Company, attention of Mr. Stadtfeld, I don't recall.

Q. In so far as the original agreement is concerned, and certain subsequent arrangements regarding prices, as far as you were concerned, they were carried on through Mr. Stadtfeld?

A. I think so.

Q. Now, do you know of any installations made around San Francisco or anywhere where this pipe was installed with the trade-mark Metalbestos on it—can you name a single installation?

(Testimony of Harry A. Dutton.)

A. I would have to check that.

Q. Then you cannot name a single installation: is that it?

A. I can name you a number of installations but I do not know whether they would have the name Metalbestos on them, because we did not start immediately putting the name Metalbestos on.

Q. About when did you start?

A. As soon as we got around to it, a short time.

[374]

Q. Approximately?

A. Probably a few weeks, three or four weeks, probably.

Q. That would be three or four weeks after the middle of September?

A. No, it was a whole lot later than that.

Q. About when?

A. It probably would be in November.

Q. November, 1933?

A. That is a guess on my part.

Q. You cannot state where any installation was made where the trade-mark Metalbestos was on the product?

A. Not at this moment.

Q. Now, during this period of time after you made the deal with the Payne Furnace & Supply Company, and prior to the time you made your deal with the plaintiff in this case, approximately how much of your stock on hand did you dispose of, that was left on hand at the time the Payne deal was made?

(Testimony of Harry A. Dutton.)

A. I will have to reiterate that, I started out with a stock of approximately \$3500 and when Williams Wallace finally took it off of my hands I had about \$1500.

Q. You just had a little less than half of the stock on hand that you had at the time you made the Payne deal?

A. Well, whatever the matter of mathematics would be.

Q. Well, approximately? A. Yes.

Q. As I understand, after this Payne deal, whenever you ordered your pipe from Williams Wallace for any special job you still put the asbestos in it, did you get the complete pipe with asbestos in it—did you put asbestos in it or did you just install what is known as the Williams Wallace Metalbestos pipe?

A. If you are referring to new pipe they made, they did not start to make that until after they took over the stock.

Q. Do you know the period of time when Williams Wallace were making the pipe with the asbestos in it?

A. No, that is their business.

Q. I mean as far as your dealings with them are concerned. A. No. [375]

Q. You do not recall that? A. No.

Q. You spoke in your testimony regarding asbestos installation and from your experience in the

(Testimony of Harry A. Dutton.)

business isn't it a fact that asbestos is not an insulator?

A. Per se, you are correct, but you must put it in in some form, and it becomes an insulator; the quality about the asbestos is it is fire-proof.

Q. That is primarily why it is used, because it is fire-proof? A. Yes.

Q. But it does conduct heat?

A. Asbestos is, per se, a good conductor of heat.

Q. Have you in your business had much business in covering pipes with asbestos, that is, as an insulation, for instance, steam pipes, and boilers, and the like?

A. In 1901 I covered every pipe in the Post Office Building; a few years ago I covered the main pipes.

Q. With air cell asbestos?

A. No, magnesia pipe covering, which has 15 per cent. of asbestos as a covering?

A. Hundreds of thousands of feet of it.

Q. And wrapped outside with a canvas covering?

A. Yes. I have manufactured it here for fifteen years. I might incidentally tell you that I started the Plant Rubber & Asbestos Works, and in fifteen years I was general manager of the plant in the manufacture of it.

Q. When did you say Mr. Payne and Mr. Fleming came to your plant in 1935, approximately when? A. In the spring.

(Testimony of Harry A. Dutton.)

Q. By "spring" you probably mean April, May or some place along there, or February?

A. Well, February, March, or April are spring months.

Q. After the deal was made by the Payne Company did you sell any of your stock on hand of Metalbestos vent pipe to the Pittsburgh Water Heater Company?

A. I should give it as my opinion that [376] I did, because they have been pretty good customers of ours.

Q. In fact, at the time or about the time you were considering the deal with Payne they were one of your best customers, were they not?

A. They might have been, yes.

Mr. Connor: That is all.

Redirect Examination

Mr. Owen: Q. Was Mr. Stadtfeld a partner of yours in the Metalbestos business?

Mr. Connor: I object to the inquiry, your Honor, because Exhibit 10 in evidence here clearly shows that they were partners, they were to share profits and losses, one-third to Mr. Stadtfeld and two-thirds to Mr. Dutton, and you cannot go back of that, that is impeaching your own evidence.

Mr. Owen: If your Honor please, that is not a lawyer-drawn instrument.

Mr. Connor: It does not make any difference what it is.

(Testimony of Harry A. Dutton.)

Mr. Owen: It is as easily interpreted as the means of determining royalty that Mr. Stadtfeld was to receive, and I want to ask this witness what he meant in the document.

The Court: I will allow the question.

Mr. Connor: Exception.

Mr. Owen: Q. Now, Mr. Dutton, was Mr. Stadtfeld a partner of yours in the Metalbestos business?

Mr. Connor: I object to that as calling for a legal conclusion.

The Court: You will have to ask him if he considered it such. I will sustain the objection to the form of the question. That is asking for a legal conclusion.

Mr. Owen: Q. Did you consider Mr. Stadtfeld to be a partner in the Metalbestos business with you?

A. Are you putting the decision up to me now?

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Q. Just answer my question.

The Court: The legal decision isn't up to you. The question is whether you had that belief.

A. If I had a thought I would say he was not.

Q. Is that the intention you intended to embody in the instrument of September 2, 1933? Do not nod. It does not do any good for the record. This is a phonographic reporter, and he only takes down

(Testimony of Harry A. Dutton.)

what you say. When you entered into that agreement, whatever it is, that arrangement there, did you think at that time that you were entering into a partnership? A. No.

The Court: Proceed.

Mr. Connor: Exception.

Mr. Owen: Q. What was the purpose of noting the one-third and two-third split on the profit then? What was that to accomplish?

A. That he would receive one-third of the profits, if we made any profits.

Q. Out of what?

A. Out of Metalbestos.

Q. Just as compensation, or what?

A. I don't know what you would term it, it is one-third of the profits, you can call it compensation or royalty.

The Court: Q. In other words, if you made a profit out of the business there you would give him one-third?

A. Yes. I don't know what you would call it.

The Court: All right, let us proceed.

Mr. Owen: I want to clear up just what your offer was to the Payne Furnace & Supply Company. From your testimony so far it appears that there is confusion, or that there were two different things that you made an offer to the Payne Furnace & Supply Company—if they would take all of your

(Testimony of Harry A. Dutton.)

stock then you would assign these rights to the invention and the trade- [378] mark Metalbestos; then you testified that Payne Furnace & Supply Company did not undertake or absolutely agree to take over all of your stock. Now, are both of those statements true, both of those conditions?

A. I should say yes.

Q. Then there was no binding arrangement on Payne to take over all of your stock, is that correct?

A. Not to my knowledge.

Q. But you had told them through Mr. Stadtfeld if they would take all of your stock then you would assign all of your rights to the invention and trademark "Metalbestos"? A. Yes.

Mr. Connor: I object to that. That is a misquotation of the record. The witness has just identified the letter Exhibit—

The Court: There is no use of argument. I think the record shows what is in evidence. It amounts to an argument by counsel before the court. Proceed.

Mr. Owen: Q. I would like you to look at this letter and read it carefully, of February 28, 1934, Exhibit 10-AW, and after you read it let me know so that I can ask you a question.

A. All right. He just showed me the letter a minute ago.

Q. Have you read the whole letter—it is a two-page letter. I want you to read it over carefully.

A. Yes.

(Testimony of Harry A. Dutton.)

Q. I call your attention to the last paragraph of that letter, which reads, "Mr. Dutton will write you as soon as the stock is turned over giving you full rights to manufacture, so far as he is concerned, and releasing him from any obligations." Now, what does the word "stock" as used in that sentence mean, what did you intend that letter to mean, because this is on your letterhead.

Mr. Connor: I object to that. The witness has not stated he wrote the letter. The witness cannot testify to what was in Mr. Stadtfeld's mind at that time. [379]

Mr. Owen: Let me ask you this question: Did you see that letter before it was sent? Was it writ-authorization?

A. Whether I saw the letter or not I will abide by everything that is written in there. It is written on my stationery and signed by Stadtfeld.

The Court: Q. Do you recall having seen it before it was sent?

A. Not specifically, but I will take full responsibility for it, because Stadtfeld must have talked about it and I told him to go ahead and write it—I don't know where the copy is, I have never encountered it, but this is certainly along the lines which we talked of, anyway.

Mr. Owen: Q. In that sentence which I read to you that letter was written with your authority?

A. Yes.

(Testimony of Harry A. Dutton.)

Q. What did the words "stock is turned over" mean, how much of the stock?

A. Stock, means all the stock I had in my place.

Mr. Connor: The same objection.

Mr. Owen: It meant all the stock, not just part of it?

A. It says stock, it does not say part of the stock.

Q. You answered about asbestos as not being an insulator unless you put it in some form. What did you mean by putting it in some form?

A. Either in the form of air cells, where it gets a good space, or as a mixture of other good insulation material.

Mr. Owen: That is all.

Mr. Connor: That is all.

ROBERT F. WILLIAMS,

Recalled for Plaintiff in Rebuttal.

Mr. Owen: Q. Mr. Williams, you are president of the plaintiff company? A. I am.

Q. And you were present when Mr. Wallace explained the activities [380] of the plaintiff company as to the kind of business it was in? A. Yes.

Q. That is correct? A. That is correct.

Q. You have not anything to add to that?

A. No.

(Testimony of Robert F. Williams.)

Q. You are the makers of Metalbestos, the flue pipe in suit? A. We are.

Q. How much experience have you had in flue pipes and pipes of that sort in their manufacture?

A. Since about 1908, having been engaged in that line of activity with the Wheeling Corrugating Company, of Wheeling, West Virginia, makers, without question, of the largest line of sheet metal products in the United States, some of their main items being conductor pipe or flue pipe, and also stovepipe.

Q. Prior to your being shown the product of the patent in suit known as Metalbestos as sold by your company, and in Payne-A-Vent sold by the defendant, had you ever seen any flue pipe of that construction before?

A. I had never seen any flue pipe like it before.

Q. Do you know Mr. J. A. Stadtfeld?

A. Yes.

Q. What was your first contact with Mr. Stadtfeld that you remember?

A. Sometime during the latter part of 1932.

Q. Do you remember where that was?

A. In our office or in our factory.

Q. Do you remember the occasion?

A. Yes. He came in to see us to secure information concerning the manufacture of aluminum elbows, and we made up for him at that time a sample made from aluminum. He was after information concerning blank sizes from which he could

(Testimony of Robert F. Williams.)

compile his costs. He said he was interested in producing a pipe having two shells, an inner shell and an outer shell, the inner shell being of aluminum. That was the reason [381] that he was after information concerning the cost of the material. We made him a sample, and I saw him from then on the first two or three months of 1933.

Q. Before you go on with that, let me ask you about when in late 1932 did this conversation take place that you have just related?

A. I would say November or December.

Q. Of 1932?

A. Yes. I can distinctly place that date because we had just been awarded a large contract by the United States Navy for the manufacture of bombs, and we were very busy at the time, and, naturally, while we are quite interested in all new items, we were not interested in taking it on at that time, we were so busy in this other work.

Q. Did he propose that you take it on at that time?

A. He wanted to know what connection he could make with us to manufacture the material. However, he was approaching us from the standpoint of being with the Standard Rubber & Asbestos Company.

Q. Now, you started in to say you again saw him in early 1933. Do you think it was February?

A. Yes, we took the prices—inasmuch as one of our major lines is conductor pipe and it is made on

(Testimony of Robert F. Williams.)

an automatic basis, and there is a regular set-up of prices, I did not give him any prices on the galvanized pipe, so far as making any note is concerned, because that is sold on the basis of list and discount easily figured, but I did work out for him the labor only of manufacturing aluminum pipe in three-foot lengths. Now, we very seldom like to sell our labor, we like to sell labor and material, but in this instance, aluminum being so foreign to our operations that we did not desire to go into the manufacture of the material—I mean by that to take the responsibility of putting in a large stock, that is the reason I gave him a price on labor only which is on this sheet here, a memo office order.

[382]

Q. Is that in your handwriting?

A. That is in my handwriting, yes.

Q. Do you know who he was employed by at that time?

A. Yes, the Plant Rubber & Asbestos Company.

Q. Did he say what he wanted to use this aluminum for?

A. Yes, he wanted to use that in connection with a new pipe that he was designing or was inventing at that time.

Q. Did he explain the construction of it to you?

A. Nothing else but that the inner pipe was aluminum and that the outer pipe was galvanized, because I remember distinctly having given him list

(Testimony of Robert F. Williams.)

prices on all of the weights, and of course the discount applicable to such list prices.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 17 the office memorandum identified by the witness as made by him on the date it bears, February 10, 1933, Plant Rubber & Asbestos Co., with the name Stadtfeld appearing thereon, and ask that it be marked.

Mr. Connor: Is it a quotation to the Plant Rubber & Asbestos Company?

Mr. Owen: I will have the witness explain what it is.

A. No, it is an office copy of a verbal quotation that had been made to Mr. Stadtfeld, for the Plant Rubber & Asbestos Co.

Mr. Connor: Are you offering it?

Mr. Owen: Yes.

Mr. Connor: I object to it as being immaterial to the issues in this case, the fact that the Plant Rubber & Asbestos Company buys some aluminum while Mr. Stadtfeld is working there has no bearing on the issues of this case.

Mr. Owen: It has this bearing, your Honor, they have tried to show that these Holtz reports came up to Mr. Stadtfeld in June [383] of 1933, and that it was from those that he got the idea of putting the galvanized sheet around it. This witness has testified that Stadtfeld came to him in February when he made the quotation and he had the idea of putting the galvanized jacket around the outside, and that is why he got this quotation, so it is material.

(Testimony of Robert F. Williams.)

The Court: It will be received.

Mr. Connor: Exception.

(The document was marked "Plaintiff's Exhibit 17.")

Mr. Owen: Do you remember if anything came of that quotation or what purpose Mr. Stadtfeld had in obtaining it from you?

Mr. Connor: I object to that. I do not think this witness can testify about what Mr. Stadtfeld's purpose was.

Mr. Owen: I will withdraw that question and reframe it.

Q. Did Mr. Stadtfeld explain to you why he wanted this quotation?

A. He said he was working on the design of a new flue pipe and wanted to compile figures of the complete cost to see how it would compare with other flue pipes that were then on the market, and if the price of the component parts would be low enough he was naturally interested in manufacturing it and wanted to know if we were interested.

Q. If I can go back just a minute to the first time that you said you saw Mr. Stadtfeld, that is, when he came down to have you make the elbow which was to go inside of an outer galvanized jacket—

A. Yes.

Q. An elbow is a 90-degree turn, is that correct?

A. Yes.

Q. Now, at that time do you remember that you, or Mr. Wallace in your presence, said anything to

(Testimony of Robert F. Williams.)

Mr. Stadtfeld about the practicability of such a pipe from a cost standpoint?

A. Well, it appeared to us at the time——

Q. I want you to speak of your own recollection and knowledge. [384]

A. I would not remember what we said.

Q. Did you encourage him?

A. No, because the cost of the aluminum was so much higher than that material that we had worked with for many years that it seemed at the time it could not compete with it.

Q. Was anything like that said to him, or do you just think that?

A. I couldn't say whether we put that to him.

Q. Now, I will ask you when was your next meeting with Mr. Stadtfeld after February, 1933, when you gave him these prices?

A. When he was connected with Mr. Dutton, or the Standard Asbestos Company.

Q. What was the nature of that contact?

A. We manufactured both the galvanized pipe and the aluminum pipe for Mr. Dutton and Mr. Stadtfeld was handling the details so far as compiling costs of material and giving us instructions as to how much pipe to make, and the various details connected with the manufacture.

Q. Do you know how long that carried on, that sale of material at that time while Mr. Stadtfeld was with Mr. Dutton?

A. Three or four months.

(Testimony of Robert F. Williams.)

Q. Then do you remember your next contact with Mr. Stadtfeld?

A. Yes, in the fall of 1934—you mean after his connection with Mr. Dutton?

Q. Yes. A. In the fall of 1934.

Q. Do you remember the occasion of that contact?

A. It was a surprise to us to see him back in San Francisco.

Q. Had you written him? A. No.

Q. Do you remember the date of that visit?

A. Yes, I would say approximately the middle of September, 1934.

Q. Sometime in September, 1934? A. Yes.

Q. Where did that visit take place?

A. In my office. [385]

Q. Had he seen anyone else in your firm before he saw you? A. He had seen Mr. Wallace.

Q. What did he propose to you, or why was he sent to you?

A. As I remember it, he had contacted Mr. Wallace for employment, and Mr. Wallace, of course, had talked the matter over with him, or the both of us talked it over.

Q. Do you remember what was said with regard to his proposal?

A. You mean between Mr. Wallace and I?

Q. Yes.

A. Yes. Mr. Wallace reported that Mr. Stadtfeld had talked to him regarding our manufactur-

(Testimony of Robert F. Williams.)

ing a pipe or manufacturing a Metalbestos line, and as we always do in such cases, we were naturally interested to see if the items are covered with a patent, also trade-marks, and going into the various features of items as to what our standing would be if we made it.

Q. Who handled that part of the negotiations, if you know? A. Mr. Wallace handled them.

Q. Do you, of your own knowledge, know what he did?

A. He contacted Mr. Dutton, who it was our understanding owned the rights to the manufacture of Metalbestos, and the use of the name, and Mr. Wallace made arrangements with Mr. Dutton to take over or, rather, to step right into his shoes.

Q. You mean to step into Mr. Dutton's shoes?

A. Yes.

Q. Do you remember whether that was a written agreement or an oral agreement?

A. It was an oral agreement with Mr. Dutton.

Q. About that time did you see Plaintiff's Exhibit 10, a contract between Mr. Dutton and Mr. Stadtfeld, dated September 2, 1933?

A. Yes, I had seen that.

Q. Do you remember the occasion of your seeing that?

A. No, I do not remember the occasion, except that it was in our office that I saw it. Apparently Mr. Wallace had brought it with him to [386] the office.

(Testimony of Robert F. Williams.)

Q. Do you remember the date Mr. Stadtfeld was taken into your employ, approximately?

A. About the middle of September, 1934.

Q. Do you remember about the first time you saw him in September when Mr. Wallace turned him over to you?

A. It was probably the first fifteen days, I would say.

Q. Of September? A. Yes.

Q. It was not earlier than that? A. No.

Q. What did your firm do after Mr. Wallace advised you that he had made a deal with Mr. Dutton?

A. We immediately began the manufacture of Metalbestos.

Q. Did it take you very long to get into it?

A. No, because we had made it before, and the type of our equipment would permit us to make it almost immediately.

Q. Did you do anything about a patent on the pipe?

A. Yes, we immediately set about investigating the possibility of getting a patent.

Q. What was done toward securing a patent?

A. An application was made.

Q. Was there anything done about the trademark Metalbestos?

A. Yes, application was made for the trademark.

(Testimony of Robert F. Williams.)

Q. I show you Plaintiff's Exhibit 12, which is the original of the trade-mark registration certificate. Is that the trade-mark registration you secured on the word "Metalbestos"? A. Yes.

Q. Are you the R. F. Williams that signed that application? A. I am.

Q. I notice the date November 27, 1933, what was the basis for that date as the date of first use?

A. Well, we naturally took it for granted that we were stepping right into Mr. Dutton's shoes and that we would use the day of his first use as the actual use [387] of the pipe, or, rather, the name.

Q. You mean the name "Metalbestos"?

A. Yes, the name "Metalbestos."

Q. Do you know Mr. E. L. Payne of the defendant company? A. Yes.

Q. Did you ever have any conversation with him, or were you present when there were conversations with him in 1934, that is the year you employed Mr. Stadtfeld in regard to Metalbestos?

A. Yes, and Mr. Payne came into our office the latter part of November or early December, 1934.

Q. Who was present?

A. Mr. Wallace and myself, together with Mr. Payne, and he was with us for quite some time, and at this meeting the question of our employment with Mr. Stadtfeld came up; it was referred to by Mr. Payne; and Mr. Payne proposed, as I remember it, and this is in addition to the evidence that Mr. Wallace gave yesterday, as I remember it, Mr. Payne proposed that we retire from the picture, so far as

(Testimony of Robert F. Williams.)

manufacture and sale of Metalbestos was concerned, and wanted to know how much money we had expended or what cost we had been put to, in the invention and preparation for manufacture of the line. We told him inasmuch as Mr. W. R. Ames was interested with us, from a policy standpoint the matter would have to be returned to Mr. Payne, who at that time was confined to his bed or to his home; due to the nature of the illness it was impossible to refer the matter to Mr. Ames, and we wrote Mr. Payne a letter in response to his letter asking what the outcome of our consideration was.

Q. You say you wrote to Mr. Payne?

A. We wrote Mr. Payne in response to his letter. During the conversation we told Mr. Payne that we had applied for a patent and he passed it off by saying that it was impossible to secure a patent inasmuch as his attorney had given him the advice that it was impossible to [388] secure a patent, and at that time furnished me with either two or three numbers of patents which had been cited by his attorney as a reason for our not being able to get a patent. We told him that we would of course leave it rest with our attorney and in the event that we secured a patent he would immediately have to stop the manufacture of Metalbestos pipe.

Q. Was anything else said that you recall?

A. Not that I recall.

Q. What was the result of that meeting—any-

(Testimony of Robert F. Williams.)

thing beyond the two letters that you say were exchanged?

A. Well, we later on secured a patent.

Q. I show you a letter dated December 17, 1934, from Mr. Payne, Plaintiff's Exhibit 13-A, and a letter Plaintiff's Exhibit 13-B; are you the R. F. Williams who wrote that 13-B exhibit? A. I am.

Q. Those are the letters that you have been referring to that were exchanged with Mr. Payne?

A. Yes, this letter is the inquiry of Mr. Payne as to what had been done in referring the matter to Mr. Ames.

Q. Did you ever have any other contact with Mr. Payne in 1935 that you remember? A. No.

Q. Were you East during that year?

A. From about the middle of May until the 3rd of July.

Q. If Mr. Payne had come to the office of your company would he have talked with you or Mr. Wallace?

A. In all probability, yes.

Q. Was there ever any dispute over the use of the trade-mark "Metalbestos" by the defendant?

A. Yes.

Q. What was the dispute?

A. We applied for a trade-mark, I cannot recall whether it was before or after we had been advised—it was after, no doubt, and we had been advised or requested to stop using the name Metalbestos, and the Payne people had secured a certificate of registration or something or other from the

(Testimony of Robert F. Williams.)

[389] Secretary of State of the State of California.

Q. On what?

A. On this name Metalbestos.

Q. What did you do?

A. After securing the trade-mark they notified the Payne Company and they acquiesced in it.

Q. That acquiescence came to you in what form?

A. This is the letter.

Q. You mean the letter of Mr. Payne dated May 20, 1935?

A. That is right.

Q. Plaintiff's Exhibit 8?

A. Yes.

Q. You referred a few minutes ago to having filed a patent application. I show you Plaintiff's Exhibit No. 1 and ask you if this is the patent which issued on the application to which you refer?

A. Yes, that is right.

Q. That was prepared at the expense of the Williams Wallace Company?

A. That is right.

Q. Did you at any time, and I wish you would state if it was more than one time, have any knowledge of Mr. Stadtfeld's financial condition?

A. Yes. He had told me many times when he was with Mr. Dutton, and also later when he came with us, that he was practically penniless.

Q. Do you remember the terms of your arrangement with Mr. Stadtfeld when he came to work for you in September of 1934?

A. He was on salary.

Q. Was he to have anything else?

A. In the event that we were able to secure a patent he was to secure a benefit or part of the bene-

(Testimony of Robert F. Williams.)

fit of that patent.

Q. In what form?

A. In the form of royalties.

Q. Do you remember the amount?

A. I think the amount was 25 per cent.

Q. Do you know if there was any provision for Mr. Dutton? A. Yes. [390]

Q. What was that?

A. In token of our securing the rights of Mr. Dutton we were to pay him an amount of money, I think it was \$800, compensating him for the loss that he had sustained in the assembly and the introduction of Metalbestos pipe.

Q. Was that subsequently paid to Mr. Dutton?

A. In full.

Q. Was that agreement with Mr. Stadtfeld written or oral in September, 1934?

A. That was an oral agreement, as I remember it.

Q. Was there ever any written agreement with him which set forth similar terms?

A. Yes, later.

Q. I show you Plaintiff's Exhibit 11 and ask you if that is the agreement to which you refer.

A. Yes, that is the agreement.

Mr. Owen: That is all.

Cross Examination

Mr. Connor: Q. You spoke of never having seen a flue pipe similar to Metalbestos pipe prior to

(Testimony of Robert F. Williams.)

seeing this pipe. What types of pipe had you seen prior to that time?

A. I had seen a stovepipe, conductor pipe, Vitex and Transite.

Q. Had you ever seen any double wall metal pipe, inner and outer pipe, both made of metal?

A. No.

Q. In connection with your business that you testified to, in your experience, were you dealing with insulating materials, etc., conductor pipes, and insulating pipes, or any pipes requiring insulating material? A. No.

Q. At the time Mr. Stadtfeld came to you in the early part of 1932, no, I mean 1933, do you know whether at that time Mr. Stadtfeld was working for the Plant Rubber & Asbestos Company? Did he mention that? A. No, he did not.

Q. Now, when Stadtfeld came to you in 1933 was he getting figures on straight pipe, or just elbows or fittings?

A. On the entire line, such as elbows, and pipe, and fittings that it is necessary [391] to have equipment to make, I mean mechanical equipment.

Q. At the time you went to Mr. Dutton—
Mr. Owen: He did not go to Dutton.

Mr. Connor: Q. At the time Mr. Wallace went to see Mr. Dutton do you know whether or not that was before or after your conversation with Mr. Stadtfeld in the fall of 1934?

(Testimony of Robert F. Williams.)

A. Well, it was after Mr. Stadtfeld came in to see us, and I think—I would not say definitely.

Q. What did Mr. Stadtfeld say about Mr. Dutton and any rights that he might have at the time he called upon you and Mr. Wallace?

A. Mr. Stadtfeld said that Mr. Dutton had the rights to the manufacture of the pipe.

Q. Anything else?

A. That if we were interested sufficiently, to get in touch with Mr. Dutton.

Q. Did he mention anything at all about the deal that had been made with Mr. Payne?

A. Except to say that he had gone down to Los Angeles with the understanding that the pipe, the line, would be made by the Payne people and that he had expected to receive a royalty after the patent had been granted.

Q. From whom?

A. From the Payne people.

Q. Anything further?

A. He also stated that he had been treated rather shabbily by the Payne people.

Q. In what way had he been treated shabbily, did he say?

A. Well, he claimed that the Payne people had not carried through on their part of the agreement that they had made, or he thought that they had made with him

(Testimony of Robert F. Williams.)

Q. Did he more specifically state what it was that the Payne Company did not do or had not done?

A. The feature of it as I remember it was that he had expected that Mr. Payne or the Payne Furnace & Supply Company would prosecute the application for patent and [392] when that was secured he would enjoy a royalty, but that was never done, application for patent had never been put through.

Q. Was that before or after he had mentioned that Mr. Dutton had some rights to the invention?

A. I would not say definitely, I don't know.

Q. Would you say it was substantially at the same time?

A. I would not say one way or the other.

Q. So that the only complaint that he had to make is that the Payne Company had not obtained a patent?

A. He also said—as I remember the conversation he also said they had not carried out their part of the agreement with Mr. Dutton or the Standard Asbestos Company, and due to their not carrying out their part of the agreement he felt that he certainly was a free agent, or words to that effect.

Q. Did he specify what the agreement with Mr. Dutton was?

A. Not that I remember, because that matter was entirely up to Mr. Wallace from then on.

(Testimony of Robert F. Williams.)

Q. Did he mention anything about Mr. Dutton still having a stock of materials on hand at that time?

A. Yes. And in fact I knew personally that Mr. Dutton did have a stock, we saw each other quite frequently at lunch, and Mr. Dutton was constantly complaining that the Payne people had not taken up the stock, and incidentally he owed us, or, rather, was owing us at that time considerable money, and it was to our interest to get that account cleared up as promptly as possible.

Q. Did Mr. Stadtfeld say anything to you at that time about the situation relative to his employment by the Payne Company relative to the development and manufacture and sale of pipe, or was that the sole complaint that they had not obtained a patent?

A. Well, as I said, it was Mr. Stadtfeld's idea, as he imparted to [393] me, that he went down to Los Angeles to work for Payne, there was a distinct understanding, or there was an understanding that they would begin the manufacture of this pipe and apply for a patent, and from that point he would begin to participate in the profits, which were to be paid to him by a royalty.

Q. That was the substance of his complaint?

A. That is the substance, I would say, of the conversation, I cannot give you the details of it.

Q. I mean that is the substance as far as you recall?

(Testimony of Robert F. Williams.)

A. That is the substance as I remember it, yes.

Q. At that time did he direct you to Mr. Dutton for the purpose of discussing and acquiring any rights that Mr. Dutton might have had at that time?

A. Yes, he immediately did that.

Q. And Mr. Dutton advised you that he still held those rights, did he, when you approached him?

A. I did not approach him.

Q. I mean was it your understanding from your discussion with Mr. Wallace?

A. My understanding was that he owned the right to manufacture Metalbestos.

Q. What with respect to the name Metalbestos?

A. Well, he owned the name and owned the right to manufacture it; in fact, he owned anything that had to do with Metalbestos pipe.

Q. Did he make that claim to you or did you assume it—I mean did Mr. Dutton make that claim of right to you?

A. He made that claim to us.

Q. Do you remember when your firm discontinued manufacturing pipe, that is, aluminum tube and the outer galvanized tube for the Standard Asbestos Company to be made up and sold as the product of the Standard Asbestos Company as distinguished from your product or any other person's product?

A. I would not say without looking at the records, our invoice records. [394]

(Testimony of Robert F. Williams.)

Q. Isn't it a fact, Mr. Williams, that that first bunch of pipe Mr. Dutton ordered in the fall of 1933 was the only pipe they ever ordered for their own account, and when I say for their account I mean as their own product?

A. No, they ordered it in subsequent amounts, as I recall it, because they would have unequal amounts of either aluminum or galvanized pipe, as the case may be; they might have more galvanized than they had aluminum for that particular size of pipe.

Q. The order was to complete the stock he had on hand? A. Yes.

Q. I understand that along about that time, or at the end of that period, Mr. Dutton, after he received your first invoice, had definitely decided to discontinue the manufacture, because he could not afford it. Did you give him further credit after that, did your firm give him further credit after that first invoice for pipe?

A. Oh, yes, we believed in the man implicitly.

Q. But he did owe you money for a long period?

A. A considerable amount, yes.

Q. When Mr. Stadtfeld came to you did he say anything about his activities in connection with the Payne Company in promoting the manufacture and sale of Payne's pipe as Metalbestos—did he discuss that phase of it at all? A. I don't remember.

Q. Did he tell you whether the Payne business in this venture had been successful or unsuccessful?

A. I don't remember that.

(Testimony of Robert F. Williams.)

Q. Did he tell you that considerable of this vent pipe had been sold and had been distributed and advertised during the period of time that he was with the Payne Company?

A. Yes, he did tell us that.

Q. But he told you absolutely nothing about any deal that was made between him, Dutton and Payne when Payne went into the matter?

A. Oh, yes, I told you about that before. He did say that Mr. [395] Dutton owned the right and title to the manufacture of Metalbestos pipe and that he had gone South, and it was the understanding that Mr. Payne would take over all of the stock of Mr. Dutton, in other words relieve him of any stock, whether finished or unfinished, that he had, and naturally we were interested from the standpoint of getting our money, and we thought it was the only way to get it.

Q. That is, he still owed you money at that time, up to the fall of 1934? A. Yes.

Q. For this pipe purchased back in the latter part of 1933? A. Yes.

Q. Have you in your files, or can you produce this first invoice rendered to the Standard Asbestos Company or Mr. Dutton for materials purchased in the fall of 1933? A. I think so.

Q. Will you produce it?

A. Yes, I will furnish a copy.

Q. A copy? A. Yes.

(Testimony of Robert F. Williams.)

Q. A copy is all right. Now, did you have any discussion that you know of regarding any right that Mr. Dutton had to the name "Metalbestos"?

Mr. Owen: This witness has not testified that he had any talk with Mr. Dutton.

Mr. Connor: My question was if he knows. Answer "Yes" or "No."

A. Yes, I know positively that the name "Metalbestos" was in his ownership.

Q. Why do you say that?

A. Having been told that three men sat together and decided on the name, Mr. Dutton, Mr. Stadtfeld and a man named, I think it is, Lilly.

The Court: This is hearsay. It seems to me we have been over a great deal of this field before, and I do not believe there is any use in having him testify to the same thing. Counsel is just going over the same ground, the same field. [396]

Mr. Connor: I will stop there.

Q. During this discussion with Mr. Stadtfeld was anything said about any rights that the Payne Company might have to the use of the trade-name "Metalbestos"—was that taken into consideration in your deal?

A. No, I don't remember whether it was discussed or not.

Q. Now, I understand the acquisition of the patent rights was merely an oral understanding between your company, Mr. Wallace and Mr. Dutton?

A. Yes.

(Testimony of Robert F. Williams.)

Q. Now, with respect to the right to the trade name "Metalbestos", was there a written transfer of that, or was there an oral transfer?

A. No, we took it for granted that when we took it over we took everything that had to do with Metalbestos, both manufacture and name.

Q. In substance, your company took this material off of Mr. Dutton's hands and he merely said "Go ahead, I won't bother you any more"?

A. Provided he would get the money back that he had advanced to Mr. Stadtfeld.

Mr. Connor: That is all.

Further Redirect Examination

Mr. Owen: Q. Mr. Williams, when you were with the Wheeling Corrugated Company would you have been in a position to know whether or not there were flue pipes on the market like the patent in suit, if there had been any?

A. No, because they were producing only products, both galvanized and black.

Q. As their own product?

A. As their own product.

Q. Do you know what any of their competitors were doing? A. No, I do not.

Q. When did you start with the Williams-Wallace Company?

A. In the fall of 1925; we began our operations January 1, 1926. [397]

Q. As an officer and running the business of the Williams Wallace Company would you have been

(Testimony of Robert F. Williams.)

in a position to know if there had been such a flue pipe on the market competing with your flue pipes?

A. Well, we would have known it from a competitive standpoint, because our sales would have fallen off and we would have made an investigation.

Q. This memorandum in your handwriting, dated February 10, 1933, Plaintiff's Exhibit 17, was that elbows or did it also include straight lengths of pipe?

A. This was only pipe.

Q. You mean straight lengths?

A. Yes, straight lengths of pipe.

Q. On your cross examination in one place I understood you to say that Mr. Stadtfeld, in explaining to you his deal with Mr. Payne, said that he expected a royalty after the patent was granted, and then in another place in response to Mr. Connor's question I understood you to say that he had expected a royalty when the application for patent had been filed, which is correct?

A. I would say after the patent had been granted. I might have misstated that.

Mr. Owen: That is all.

Mr. Connor: That is all.

J. A. STADTFELD,

recalled for Plaintiff in Rebuttal.

Mr. Owen: Q. Will you state your name, please?

A. Jacob A. Stadtfeld.

Q. Your residence?

(Testimony of Jacob A. Stadtfeld.)

A. 5245 California street, San Francisco.

Q. What is your occupation?

A. I am connected with the Williams Wallace Company.

Q. On what kind of a basis?

A. You mean financially, or what is my employment?

Q. Yes.

A. I am under a salary and royalty on the Metalbestos pipe. [398]

Q. Are you the patentee of the patent in suit?

A. I am.

Q. How long have you been interested in problems in connection with flue pipes?

A. Oh, about 16 or 17 years.

Q. Why and how did you become interested in this problem?

A. Because I was put to work at one time selling a new type of insulated gas vent, not only selling it, but investigating it; it was something new in the market and the people who took it on were not quite sure as to whether it would last or not, so for that reason I not only sold it but I investigated it from the standpoint of durability, its general qualities.

Q. What was the name of that product, do you know? A. Yes, that was called Insulex.

Q. Was it a success? A. No, it was not.

Q. How was it received when it first came on the market?

(Testimony of Jacob A. Stadtfeld.)

A. It was very well received, because at that time, outside of possibly some of the English products that were made of insulating materials there was not any made in this country of a similar nature.

Q. Did you continue being interested then in the vent pipes after that experience?

A. Yes, almost continuously, I will say almost continuously; I mean this, that I might have worked at something else, I think I did, but I was always experimenting in my own shop at home, if that were the case, so I would say I was continuously interested in it from that time on.

Q. Why did you have such an absorbing interest in the development of vent pipe?

A. Because I realized there was a very good market for such a product, and at the time there was not a suitable product on the market.

Q. Did your work at that time and your observation of Insulex lead you to make any invention or come to any conclusion as to the desirable characteristics of a gas flue pipe? [399]

A. Yes, it could be realized from the inspection and investigation of this Insulex that it is essential to keep the gases heated so that they would not condense, it was of prime importance to have those gases pass through a material that would not disintegrate or corrode; that was very essential, and of course there must be adequate protection against

(Testimony of Jacob A. Stadtfeld.)

corrosion or disintegration from the water. There were those two problems, water and the gases.

Q. You mean there was the problem on the inside from the moisture and on the outside water?

A. Yes, and then the combination of both.

The Court: We will take an adjournment now until Tuesday morning at ten o'clock.

(An adjournment was here taken until Tuesday, March 8, 1938, at ten o'clock a. m.) [400]

Tuesday, March 8, 1938.

J. A. STADTFELD,

Direct Examination

(Resumed).

Mr. Owen: Q. Mr. Stadtfeld, when we adjourned Saturday you were explaining what you regarded as the essentials of a good flue pipe. You had pointed out the ability to get a high stack temperature and *prenting* leakage of the condensate into the insulating material, and of the outside moisture into the insulating material. Now, are there any other essentials?

A. Yes, there is one essential I think that most of us overlooked; a pipe must be made at such a cost that it is commercially useful; in other words, we could make many pipes that would cost \$2 or \$3 a foot, but we could not sell them, so that cost is quite an essential element, I would say.

(Testimony of Jacob A. Stadtfeld.)

Q. Anything else?

A. I think that broadly covers it.

Q. As I understand it, those are what you regarded in 1927 as the essentials of a good flue pipe. Have those essentials changed any since that time?

A. No, they have not.

Q. Now, will you refer to the chart, which at this time I would like to offer in evidence as Plaintiff's Exhibit No. 18—

Mr. Connor: As I understand, this is being offered purely for argument?

Mr. Owen: This is to show the environment of the patent in suit.

The Court: For the purpose of illustration?

Mr. Owen: Yes.

The Court: Do you offer that in evidence?

Mr. Owen: Yes.

The Court: It will be received as Plaintiff's Exhibit 18.

Mr. Owen: Q. Now, will you please refer to the chart and ex- [404] plain as briefly as you can what occurs in a flue pipe from a cold start? In that connection, you might apply reference numerals to this exhibit if you care to do so.

A. I would say that this represents a typical flue installation for a gas appliance, it does not have to be a solid pipe—as a matter of fact, this does represent a solid type of wall pipe.

Q. This is not the pipe of the patent in suit?

A. No.

(Testimony of Jacob A. Stadtfeld.)

Q. Just any pipe?

A. Any pipe. What usually happens in an installation of this kind, where a pipe is not insulated, is when the gas from this burner has been drawn in——

Q. Will you indicate that with a reference numeral? A. What will I call it, No. 1?

Q. Yes.

A. No. 1 on the drawing, the gases heat this water and travel through and around——

Q. You are referring now to the water heater?

A. This is the water heater. The gases have done their work when they reach this outlet.

Q. Will you mark that 3?

A. No. 3, so that they are still down approximately a point of say, for a matter of illustration 300 degrees; the back draft reverter placed at the outlet——

Q. Mark that 4.

A. Runs them off the intake of cold air with the burned gases so that they fall down from that 300 degrees to possibly 200 degrees; then they start drawing up this flue; they cannot go very far before they reach this point.

Q. Is that a point on the second floor which you have marked?

A. Yes, that seems to be the second floor.

Q. Mark that 5.

A. They fall down below to the dew point of the temperature at which the products of combustion start to condense.

(Testimony of Jacob A. Stadtfeld.)

Q. What is that dew point?

A. Well, with natural gases it will [405] range 135 or 140 degrees, so that when that temperature less than dew point is reached the gas is condensed and the condensate starts dripping on back down.

Q. Back down what? A. Down the pipe.

Q. Inside or outside?

A. Inside of the pipe, if the joints are such as to confine the condensate within the pipe. In the case of this insulation that condensate would come back down and reach through into the very element of the heater. Now, in the case of a solid wall type of pipe that condensate as it runs down, a certain amount is absorbed into the wall.

Q. The wall of what?

A. Of the pipe; in time that will become thoroughly saturated and of course as the pipe wall does become saturated you are lessening whatever little insulation value there might have been in the wall, because it is hard to get by this point.

Q. You mean by "this point" what?

A. The point 5, because of the reason that the oncoming gases never could overcome that rapid falling due to the wall having absorbed the moisture and that would require a conductor in this case opposite this appliance 6.

Q. You mean the reverter at the second floor room?

(Testimony of Jacob A. Stadtfeld.)

A. That is another plant on the same line of pipe in the same flue. In the event this is operated at the same time of course that would accelerate that draft because it would help to heat up the inside of that stack and possibly the fumes to some extent would be exhausted, but there would always be the dripping back; depending on the nature of the pipe it might eat up some of the acid that is contained in this condensate, but certainly the dripping back would not as a result allow the inside of this heater to stand this condition. [406]

Q. You mean the water heater?

A. The water heater and the burner, it would drip it down through here; in many instances they have to provide drainage to carry off that condensation of gas in such excessive quantities.

Q. Will you explain how the device of the patent in suit functions to cure any of those troubles, if it does?

A. It does cure them for this reason, we first of all have an aluminum shell, the inner pipe is composed of aluminum; that is not only immune to the action of these gases that might be set up, but it has reflecting properties and conducting properties that make them almost immediately heat the stack; in other words, you have got your heat constantly bouncing away from that surface, and the accelerated upward movement, and you also have a rapid conduction from this point right up.

Q. This point being—

(Testimony of Jacob A. Stadtfeld.)

A. The outlet of the pipe.

Q. At the point what? A. At point 3.

Q. Right up to where?

A. To the exit. As a matter of fact this is just theory to explain it in this manner, but actual installations have proven that there is rarely if ever any place of the condensing of the burned gases within the average metalbestos flue; we have, of course, provided sufficient insulation to heat these gases within the pipe; the hot air does not get a chance to work through to cool the gases down, nor do the gases get a chance to work through the insulation to come in contact with the outer area. In other words, they remain above the dew point, generally speaking.

Q. What is that due to?

A. That is due to the efficiency of the insulation and accelerated by the reflecting surface of the aluminum.

Q. In the device of the patent in suit is there any opportunity for [407] that condensate to run down into the insulating material?

A. No, that is one of the outstanding features of the pipe that leak-proof connections have been provided for both inner and outer pipe.

Q. The installation you have been describing is what is known as an interior installation?

A. Yes.

Q. Where you have an exterior installation what feature does the patent in suit contribute?

(Testimony of Jacob A. Stadtfeld.)

A. It contributes, first of all, a feature of leak-proof joint of the outer casing; in other words, the male end of the outer casing is always pointed up, the female end sticks down from that, so that rain water coming down the pipe would shed from that joint, the same effect that it would have as rain running from the shingles of a house, always over and onto the next piece.

Q. Have you ever made any tests of flue pipe of the patent in suit and compared it with other types of flue pipe then on the market? A. Yes.

Q. I show you Defendant's Exhibit 10-AB, which is a letter written by you to the president of the defendant company, dated December 8, 1933, which shows the results of tests. Did you make those tests?

A. Mr. Dutton and the Standard Asbestos Company and I made them.

Q. You made them together? A. Yes.

Q. I notice that the fifth and sixth columns represents Metalbestos, and the first and second columns represent pipe A. Do you remember what pipe A stands for?

A. Pipe A is Transite. It is just column A. Column A represents Transite manufactured by the Johns-Manville Company.

Q. But those are just the first two columns of figures, aren't they?

A. Well, yes, the first two columns.

Q. It is Transite? A. Yes.

(Testimony of Jacob A. Stadtfeld.)

Q. Is that a competing material to that of the patent in suit? [408] A. Yes.

Q. Is this pipe which I put before you a sample of the Transite to which you have just referred?

A. It is, yes.

Q. Does this pamphlet which I hand you describe that Transite flue pipe? A. Yes.

Q. Is that the pipe which was used in this comparative test? A. Yes.

Q. Shown in Exhibit 10-AB?

A. Yes. In fact, this is the exact piece that was tested.

Q. This is the exact piece that was tested?

A. Yes.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 19-A the pipe and as 19-B the circular describing the pipe.

Mr. Connor: I object on the ground it is immaterial to any issue.

The Court: I think it is simply for illustration. If you object that that cannot be disclosed to the Court it certainly would have to be marked for identification.

Mr. Owen: This illustrates a test in connection with a report they have introduced.

The Court: Q. What is that commodity made of? A. Cement and asbestos fibre.

Mr. Connor: I do not see the materiality of it, I do not see the reason for it.

(Testimony of Jacob A. Stadtfeld.)

The Court: In other words, you simply want to illustrate what that is?

Mr. Owen: Yes.

Mr. Connor: I do not see how that has any bearing on the question of invention in this case. The vent pipe in issue might be far superior to any other pipe on the market, and yet not involve invention. I think it is just incumbering the record with [409] evidence that is not material.

Mr. Owen: It is one of the indicia of the presence of invention.

Mr. Connor: It is an entirely different material. We are dealing with a metal pipe and this is a cement pipe.

The Court: That only connects up with that letter to show what it is?

Mr. Owen: Yes.

The Court: I will allow it in.

Mr. Connor: Exception.

(The pipe was marked "Plaintiff's Exhibit 19-A"; the circular was marked "Plaintiff's Exhibit 19-B.")

Mr. Owen: There is a pipe B referred to. What is that?

A. That is Vitex, which was then manufactured by the Plant Rubber & Asbestos Company.

Mr. Connor: Pardon me if I interrupt. I am trying to find the exhibit. I think you are in error. I think it is 10-AU.

The Court: That was formerly A-47.

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: This is A-47, 10-AU, that is right.

Q. I show you a piece of pipe and ask you if this is the pipe to which you refer as Pipe B?

A. Yes, that is right.

Q. And the circular labeled "Vitex," does that describe this pipe? A. Yes, that does.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 20-A the pipe and as Exhibit 20-B the circular.

The Court: It will be received.

(The pipe was marked "Plaintiffs' Exhibit 20-A"; the circular was marked "Plaintiff's Exhibit 20-B.")

Mr. Connor: The same objection as made to the previous offer.

The Court: The same will be received.

Mr. Connor: Exception. [410]

Mr. Owen: Q. Going back for a moment to this chart Exhibit 18, what condition ensues at the burner when you have the filling of the gases which you described?

A. That filling of the gases that I referred to means this, that there is no draft, or at least not a satisfactory draft. That being the case, there may and does result a condition which is hazardous for the reason that the burner function in that condition is producing carbon monoxide in possibly excessive quantities; in other words, that the mixture is not correct and you are then producing carbon monoxide.

(Testimony of Jacob A. Stadtfeld.)

Q. What keeps the mixture from being correct?

A. Improper draft, for one thing, and improper mixture of air.

Q. How does that affect the improper mixture of air?

A. Well, if you are not having a proper draft to carry off these gases, or the gas is burned, there is no place else for them to go, it backs down.

The Court: And it gets into the room?

A. It would if the joints were not tight. As far as the pipes are concerned, it is liable to back out of the opening of the furnace.

Q. It is bound to ultimately come out, because it does not go through the flue? A. Yes.

Mr. Owen: You referred to a back draft reverter 4 at the top of this appliance. Are those always installed?

A. No, they are not always installed. A lot of the appliances come with them attached to them; a lot of the appliances it is a part of the appliance, itself, you might say, and others do not come equipped with them, but in many instances where they are, for instance on water heaters, I know of many cases where they took them off for the reason that they did allow that intake of cold air which retards the draft. [411]

Q. Why didn't they want the draft reverter?

A. Because they wanted to carry off the burned gases to the outer air.

(Testimony of Jacob A. Stadtfeld.)

Q. Then even with the presence of that back draft reverter it interfered with the production of sufficient draft: is that it?

A. By cooling down the gases.

Q. Is the appliance manufacturer interested in what temperature those gases come out of Outlet 3 of that water heater?

A. Yes. If those gases come out of there too hot it means that the appliance is not utilizing, in other words, they are wasting a lot of heat that is not utilized.

Q. What is an appliance manufacturer's aim, as far as the temperature is concerned?

A. To keep as high an efficiency to use up as much of that gas as is possible, as in sending out the heat, in the case of warm air or utilize it to heat water, as in this case.

Q. Does he want a high or low temperature at the outlet of the appliance?

A. He wants as low a temperature as he can get and still allow for the gases to travel through the flue to the outer air so that good draft can be maintained; in other words, he will use up just as much of that gas as he can, but will keep the temperature of the outlet down as low as he can, to insure some satisfactory gas in the vent pipe to carry up the products of combustion.

Q. Have you any idea from your own knowledge about what the average outlet temperature is?

A. Well, you mean my own information?

(Testimony of Jacob A. Stadtfeld.)

Q. No, what you know from your experience.

A. They run from 250 to 400; some of them run to 500 degrees.

Q. At that point?

A. Yes. I am thinking of the highest temperature in connection with the old type of instantaneous water heaters, where the gas travel was practically directly into the flue. [412]

Q. Would you say, looking at Exhibit 10-AU, that compilation of tests there, the temperature given for the Metalbestos device is adaptable to the operation of a Metalbestos flue, that is the flue of the patent in suit?

A. Yes. They were never shown to vary much from those figures; in other words, it shows the quick heating up of the entire run, running up, relatively speaking, four or five times as quickly as in the other two pipes shown here, which of course is desirable. That means the establishment of draft is set up almost immediately, as compared to other types of pipes.

Q. You referred to ease of installation as an outstanding feature. Why is that important?

A. Well, at the present time the labor cost is so high that it has become favored in connection with the building of installations of any kind. In other words, we can erect this pipe two or three or four times quicker than other types commonly used, and that means a big saving of labor, which is, of course,

(Testimony of Jacob A. Stadtfeld.)

reflected right down the line to the ultimate home owner.

Q. What features about this pipe makes it so quickly and easily assembled?

A. Well, I think Dr. Dutton brought that out. It is more or less a connection like the stovepipe, with the male and female end, you just stick it together and run it up. It is something that anyone can install. There is nothing complicated, no joints to be cemented, or anything of that nature.

Q. Now, you testified earlier that you tried to perfect this Insulex, and that was a failure.

A. Yes.

Q. What did you do after that?

A. I kept on working, in fact I started then working on a flue pipe, and I think, as I testified, I saw that the market was ripe for such a product at a reasonable price; it impressed me to the extent that I did from that time on [413] work on flue pipes or vent pipes, as they might be called, for gas appliances.

Q. Where did you do this work?

A. I did it at the start at my own home in the basement, I had a shop in my home, and I used to experiment in the basement.

Q. Who paid for that work?

A. I paid for that, myself.

Q. What was the result of the work that you did there?

(Testimony of Jacob A. Stadtfeld.)

A. I produced a pipe that I thought was pretty good, which later proved to be this Vitex.

Q. You mean this Exhibit 20-A?

A. That is the first pipe, I don't know the exhibit number.

The Court: The first one was 19?

A. The first one was Transite. The second one is the one I refer to.

Mr. Owen: Q. You say you built this pipe or began the development of it?

A. Yes. I made it up, as I said, in my basement, and then when I got it to a point where I thought it was pretty good I rented a loft on Beale street and started to make it.

Q. Whose money were you using then?

A. It was my money, I borrowed it, and begged it, and what-not.

Q. What became of that work?

A. I eventually sold it to the Plant Rubber & Asbestos Works, they took it over.

Q. Did you have anything further to do with it then?

A. Yes, I went with them and stayed with them, I believe the term was from 1926 or 1927 to 1931, through 1931.

Q. That you were with them?

A. Yes, the first time.

Q. What were your duties with them?

A. To supervise the manufacture and sale.

Q. Of Vitex? A. Of Vitex.

(Testimony of Jacob A. Stadtfeld.)

Q. Did they market Vitex, do you know?

A. Yes, they did, in quite large quantities, eventually. [414]

Q. Was it a success?

A. It was at first, but it petered out, it did not hold up.

Q. Why was that?

A. There were certain changes in manufacturing methods made; when we got into real production we found—that was when we were called upon to deliver quite large quantities of it, we found that we were not properly equipped to turn out those amounts, and so they rebuilt, you might say, the whole vent. Where we used to let the pipe air dry before we put it through the oven, they pre-heated it; there was a hurrying of the pipe through various processes. They changed the vent, and the paper was changed; in fact, there were so many changes I got almost bald-headed worrying about it and it went to pieces.

Q. How did it go to pieces?

A. It went to pieces for this reason, that the cement in this pipe was a zinc silicate, and it had silicate of sodium in it, zinc oxide, and some other materials which are really of no importance, and that silicate of soda contained soda, of course, in the form of soda ash or caustic soda, and if not properly combined with the zinc it leaves a free soda which leaches out in the presence of moisture, and of course there is plenty of moisture from the gas

(Testimony of Jacob A. Stadtfeld.)

and elements—it is a porous structure, readily absorbs, and it will become saturated, and then with the drying out process it would bring to the surface the alkaline solution—the water would evaporate, leaving a solid deposit on the surface of the pipe, or it would build up to a point where there was a regular crust on the pipe.

Q. What did that do?

A. Well, that meant the pipe was no good.

Q. Why?

A. Well, it just disintegrated, took so much out of the wall of the pipe there was nothing left but the asbestos.

Q. Did the company continue to sell Vitex?

A. No, they went out of Vitex. [415]

Q. Do you know why they quit it?

A. They went out because they lost so much money making replacements.

Q. Have you any idea how much money was lost on that pipe?

A. I cannot speak with authority, but I understand they lost about \$50,000, which included the first investment for equipment.

Q. Did that Vitex fulfill the requirements of a perfect vent? A. No.

Q. Wherein did it fail?

A. Inasmuch as asbestos is not an insulator, as one commonly believes, it is more or less fireproof, and fire-retarding; it is only an insulator when it is put up in some cellular form, but being fire-proof

(Testimony of Jacob A. Stadtfeld.)

or fire-retarding, it gave me a basis to work on. However, it made a very presentable product, but there was a failure in connection with insulating value. When it went on the market it was readily accepted.

Q. What did that failure of insulating value have to do with its performance?

A. It allowed the gases to cool down to the extent that they were very readily condensed and subsequently were absorbed into the wall of the pipe, which is a very bad thing for that type of pipe.

Q. While you were employed by the Plant Rubber Company during this period from 1926 until 1931, were you working with any other forms of flue pipe, and, if so, what were they?

A. Up to 1931?

Q. Yes, when you left the Plant Rubber Company.

A. Yes, for the first few years I did not, but when complaints started coming in about this pipe I naturally felt around for some remedy and it seems that the last couple of years that I was there, I was trying all sorts of different pipes, of course keeping in mind that I had to produce something along this line, and there were various different changes and suggestions brought out in [416] connection with this Vitex.

Q. Now, what did you do in 1931 upon leaving the employ of the Plant Rubber & Asbestos Company, if you remember?

(Testimony of Jacob A. Stadtfeld.)

A. In 1931 I went to—I don't know whether it was immediately, but I went to work for Wayland.

Q. Wayland who?

A. Wayland Manufacturing Company.

Q. What were you doing with them?

A. I was developing warm air pipe made of corrugated asbestos and similar cement to this.

Q. Warm air pipe? A. Yes.

Q. How is that distinguished from the flue pipe?

A. There is no gases present in the warm air pipe, you just have hot air.

Q. Is that for house heating?

A. For house heating, yes.

Q. While you were there were you working on any flue pipes?

A. Yes, I did. While I was working on this warm air pipe I still had in mind that this Vitex could be improved, or I thought I could improve it, and I was constantly working on flue pipe, regardless of warm air pipe; I made several pipes which occurred to me as a flue pipe, and one of them contained this corrugated paper in a good deal the same manner as I was making up the warm air pipe.

Q. Did you do any work there during that time on any structure like the patent in suit?

A. What year is this—is this 1932?

Q. No, 1931, when you were with Wayland.

A. No, I did not.

Q. Do you remember when you left the employ of the Wayland Manufacturing Company?

(Testimony of Jacob A. Stadtfeld.)

A. I do not remember exactly, July or August.

Q. Do you remember what you did when you left their employ?

A. I believe that I worked for the Payne Furnace & Supply Company for a couple of months.

Q. That is the defendant in this case?

A. Yes.

Q. Do you remember about the time of your period of employment by them?

A. That would be early in 1932, as near as I can remember. [417]

Q. You may refer to Exhibit 10, which is a group of letters, and see if there are any of your letters in there which would refresh your recollection as to the period?

A. Well, I think it was two months, I don't know whether that was April and May or March and April, I don't remember. It was not over three months. I see this letter is dated in May. It was possibly the months of April and May. Whether I was there in March I could not tell, unless you want me to take the time to look all through these letters.

Q. I call your attention to a letter, Exhibit 10-M, dated June 4, 1932. Does that have anything to do with your employ by the defendant? A. Yes.

Q. Does that help to fix the period when that employment terminated?

A. Yes. He mentioned in this letter the middle

(Testimony of Jacob A. Stadtfeld.)
of the month. That would be the middle of June,
1932.

Q. That is, your employment terminated?

A. Yes.

Q. Then at that time you went off the Payne payroll, did you? A. Yes.

Q. You were present when Mr. Payne mentioned a check of May 11, 1932, for \$13, and another check of May 26, 1932, for \$22.75, to cover materials. That was during your period of employment, was it? A. Yes.

Q. Do you remember the materials purchased with that money?

A. Well, I remember some mandrels, wooden mandrels that I had made to fit on this machine, that was in the Wayland Manufacturing Company. It was for asbestos that I used. I believe that, broadly, covers the extent of the purchases.

Q. Do you recall at any time ever receiving any other check from the Payne Furnace & Supply Company to purchase materials for you to use in experimenting?

A. No, I do not. I think that was the only occasion for anything of that kind. [418]

Q. Was there any agreement during this period of employment which Mr. Payne testified ran from about May 1 to June 15, 1932 that developments made after that on your employment would belong to the Payne Furnace & Supply Company?

A. No.

(Testimony of Jacob A. Stadtfeld.)

Q. Up to this time that your employment terminated on June 15, 1932, had you conceived the invention of Metalbestos, the patent in suit?

A. No.

Q. What did you do next after leaving their employ on June 15?

A. Shortly after that I went back to the Plant Rubber Company; I believe there was a period of possibly a month that I did not do much of anything.

Q. Do you remember about the month that your arrangement began the second time with the Plant Rubber & Asbestos Company?

A. Yes, that was July of 1933.

Q. Your second employment?

A. With the Plant Rubber Company.

Q. With the Plant Rubber & Asbestos Company?

A. Oh, no, it was earlier, it was February, 1933.

Q. Now, then, what did you do——

A. I quit in July.

Q. You quit in July, 1933?

A. And started in February.

Q. What did you do between June 15, 1932, and February, 1933, a period there of about six and a half or seven months?

A. About all I did was keeping working on this vent pipe.

Q. Whose money were you using for that?

A. I was using my own money.

Q. Whose materials were you using?

(Testimony of Jacob A. Stadtfeld.)

A. I was buying them, or borrowing them, or getting them one way or the other. [419]

Q. Do you remember when it was that you conceived the invention of the patent in suit?

A. Yes, it was in the latter part of 1932.

Q. How do you fix it at that time?

A. Well, because I remember of having—I had conceived the idea of the pipe, and that did not seem to stump me much, but putting the fittings together to go with the pipe bothered me, and I scouted around to all of the places where I might get the fittings made, and I eventually would up with the Williams Wallace Company, who seemed to have the only machines to make the elbows, and they were pretty busy making bombs, and I know it was during that period that they were working on this bomb contract, so I can firmly fix the time as then that I went to them about these elbows.

Q. Do you remember what transpired when you went to them?

A. I remember they made me an aluminum elbow that was full of holes, and they discouraged me because the cost would be too high, and they could not make an outer galvanized fitting to come out even with the aluminum, and so I for the moment gave up further thought of going ahead with it.

Q. Going ahead with what?

A. With the Metalbestos, as we now call it.

Q. You mean the structure of the patent in suit?

(Testimony of Jacob A. Stadtfeld.)

A. Yes.

Q. When did you say this was?

A. This was the latter part of 1932.

Q. What did you do next after they discouraged you about the cost and practicability of this device of the patent in suit?

A. I tried to make it up without the outer casing then, which would simplify the construction and hold the cost down.

Q. Do you remember the construction that you then made?

A. Yes, that is just the aluminum pipe wrapped with the air cells, as pre- [420] viously described and referred to as Allumicell.

Q. How was that asbestos attached, if at all, to the aluminum inner coil?

A. It was cemented right to the aluminum pipe with a silicate of soda and zinc oxide cement.

Q. What was your financial condition during all of this time? A. Well, I was just broke.

Q. Did you make up any samples of this Allumicell that you are talking about? A. Yes, I did.

Q. Did you make up those with your own money or somebody else's money?

A. With my own money, borrowed money.

Q. What did you use that money for?

A. Well, what do you mean?

Q. To buy the materials with?

A. Oh, yes, sure, to buy the aluminum and the air cell paper.

(Testimony of Jacob A. Stadtfeld.)

Q. Do I understand that you made up some of those samples of Allumicell? A. Yes.

Q. What did you do with those samples?

A. I showed them around—I think I made up small samples and it was these samples that I showed first of all to Harry Payne.

Q. You mean of the defendant company?

A. And subsequently to El Roy Payne.

Q. What grew out of your having showed those to the Paynes?

A. I went down to Los Angeles, to their plant, and down there I made up a length of the pipe, I imagine it was 24 or 30 feet of it, in 3 feet lengths, to be used in a test that Mr. El Roy Payne referred to as being conducted by, I believe it was, the Southern California or Southern Counties, I forget which, Gas Company.

Q. When you made up that pipe down there did you put the galvanized shell on that you conceived earlier? A. No.

Q. How long did you stay down there at their factory, do you remem- [421] ber?

A. It was not very long, I don't think it was over a week; possibly it was ten days.

Q. Were you on the payroll? A. No.

Q. What was the general reason for your being down there?

A. I was trying to interest them in going ahead with the manufacture of the pipe.

(Testimony of Jacob A. Stadtfeld.)

Q. Did you have any correspondence with them in connection with Allumicell that you remember, and in this connection I call your attention to Defendant's Exhibit 10-Z, which you have there in your lap. Will you read that letter, or at least the fourth paragraph? Does that refresh your recollection as to the arrangements you were to have with them? A. Yes.

Q. Were you there as their employee?

A. No, I was not.

Q. What kind of a deal were they to make if they took on Allumicell?

A. As referred to in that letter, they were to apply for a patent, and I was to make the assignment in consideration of a mutually satisfactory arrangement as to remuneration.

Q. What did you do when you returned to Los Angeles after that short visit in January, 1933?

A. I went to work for the Plant Rubber & Asbestos Works again.

Q. What was your financial condition all this time? A. Just the same.

Q. What was that?

A. I was devoid of funds.

Q. What did you do at the Plant Rubber & Asbestos Company on this second period of employment?

A. I went back there to, if possible, perfect this Vitex that had been giving so much trouble, or to

(Testimony of Jacob A. Stadtfeld.)

produce some other acceptable pipe, and I realized that pipe had to be protected on the inside against the absorption of the condensate, and for that reason I considered that it had to be lined with a metal, and on investigating all of the metal [422] I found that aluminum was the only one within the price range that would be suitable for that purpose. I still felt that the outside did not have sufficient protection, and I believe the first few weeks that I was with the Plant Rubber, or possibly the first week, I made up the first two pieces of what is now called Metalbestos Gas Vent Pipe.

Q. You mean the pipe of the patent in suit?

A. That is the pipe of the patent in suit, the very first time I ever made it.

Mr. Connor: Might I inquire that date, Counsel?

Mr. Owen: It was early in February, the first two weeks of the month.

Mr. Connor: February, 1933?

Mr. Owen: Yes.

Q. I do not believe you mentioned the month you went back to the Plant Rubber & Asbestos Company.

A. Yes, it was February.

Q. February, 1933? A. Yes.

Q. What did you do with the samples that you made up?

A. I submitted them to Mr. Charles Wright, who was then at the plant of the Plant Rubber & Asbestos Company.

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: Might I interrupt here just a minute to say Mr. Wright is going to be here as a witness. He had a stroke about two years ago, so that he may not talk as loud as a witness usually does, and I wanted your Honor to know that before he goes on the stand, as I do not want to embarrass him.

Q. What have you to fix the time when you made up those two sections of Metalbestos which was the first time you say you ever made them up?

A. I definitely decide that date, or that period, by the purchase of aluminum by the Plant Rubber & Asbestos Company.

Q. From whom were those purchases made?

A. The Pacific Metal Company. [423]

Q. Did you go there and look over their records and find out what records there were at that time?

A. Yes—to the Pacific Metal?

Q. Yes. A. Yes.

Q. An examination of purchases made during the months of your employment by Plant Rubber Company which are stipulated into the record on page 219—can you say, or is it possible for you to identify what aluminum there was used for this purpose? A. I know it was 24 gauge.

Q. How do you know that?

A. Well, because that was the only 24 gauge we ever bought at the Plant Rubber Company, and it was specifically for that purpose. The other gauges were for other purposes, entirely, and I am very

(Testimony of Jacob A. Stadtfeld.)

positive about using 24 gauge on the first sections that I made.

Q. What was the date of that purchase?

A. I am trying to find it. I believe it was on February 23.

The Court: What are you reading from there?

Mr. Owen: That was when we stipulated that the witness, if called, would testify that the purchases were made on the dates and the amount and time.

Mr. Connor: I think there was an objection made to that.

Mr. Owen: Your objection was to the materiality of it.

Mr. Connor: I think the Court reserved a ruling.

Mr. Owen: I said at the time that I would show by this witness that it tied in with his proof when he made these.

A. On February 23rd, among other items, there is a piece of 24 gauge aluminum 12 inches by 72 inches; that was sheared in two and trimmed slightly, which would give two pieces of pipe, and I remember it was 3-inch aluminum pipe that was made of the 24 gauge. Of course, that would take a four-inch outer casing to [424] make what we call 3-inch Metalbestos pipe.

Mr. Owen: Q. How much time elapsed between the purchase of this material and the actual making of the pipe?

A. The pipe was made almost immediately, either the same day or the following day.

(Testimony of Jacob A. Stadtfeld.)

Q. Who purchased the material that went into these pieces of pipe?

A. The Plant Rubber & Asbestos Company.

Q. What did you do with them when you had made them?

A. I submitted them to Mr. Wright.

Q. Do you remember what transpired after you submitted those, and why you submitted them to the Plant Rubber & Asbestos Company?

A. I submitted them mainly for this reason, that Mr. Wright had told me, while my former contract with them had been cancelled, or was void, he told me if I could produce a pipe that was acceptable and satisfactory, it would have to be made on the same kind of royalty basis, and I was naturally anxious to submit to them the best pipe that I could possibly think of, and that was it.

Q. Did you make a deal with them about that at that time?

A. No, they were not interested in it.

Q. Why were they not?

A. Because, in fact, I remember Mr. Wright's very words, "We are not in the sheet metal business, we are in the asbestos business, and this is a job for a sheet metal shop."

Q. Did you, during your time of employment with the Plant Rubber & Asbestos Company, show this pipe to anybody else, and by "pipe" I am referring to the two samples of Metalbestos that you made up in February, 1933?

(Testimony of Jacob A. Stadtfeld.)

A. I think I may have shown that——

The Court: You say “may have”. Just give us your recollection. If you do not recall say so.

A. I do not recall. [425]

Mr. Owen: Calling your attention to a letter of July 17, 1933, Defendant’s Exhibit 10-AN, which you wrote to the defendant company, particularly the third paragraph, I will ask you if that refreshes your recollection.

A. Yes, it does. I knew that I had shown this pipe to Mr. Payne, but I did not know that it was during my period of employment at the Plant Rubber Company, but evidently I did, according to the letter.

Q. Approximately when was it that you say you showed it to him? A. Possibly in May or June.

Q. You showed it to others, did you, or did you not? A. Yes, I did show it to others.

Q. Now, in answer to interrogatories propounded by the defendant, plaintiff was asked to state the date of conception, disclosure first written description and reduction to practice with respect to this invention. Those were interrogatories 2, 3, 4, and 5, and you, probably to Mr. Williams, an officer of the plaintiff, gave the date of late summer, 1930 for interrogatories 2 and 3, the fall of 1930 for the reduction to practice, and July 23, 1933 for the first written description. How do you reconcile those dates with the dates which you have now testified to?

(Testimony of Jacob A. Stadtfeld.)

A. At the time I gave those dates I had nothing to refer to that could firmly fix them, and I knew it was during my time of employment with the Plant Rubber Company. However, after going over the records that later became available I saw my error in assuming that those were the dates.

Q. Were the dates which I just read to you and which you furnished Mr. Williams during one period of your employment by the Plant Rubber Company?

A. Yes, that was during the latter part of my term of employment.

Q. You did reduce it to practice while you were with the Plant Rubber [426] Company?

A. Yes.

Q. But it was the second period of employment?

A. Yes.

Q. Do you remember how long you stayed with the Plant Rubber Company on this second period of employment?

A. It was about five months. I left in July of 1933.

Q. When you left did you render a report on the work you had done? A. Yes.

Q. Have you a copy of that report?

A. This is a copy that I have in my hand.

Q. Was a copy of the original made at the same time? A. Yes.

Q. Where has it been all of this time?

(Testimony of Jacob A. Stadtfeld.)

A. I had it attached to my old agreement with the Plant Rubber & Asbestos, and subsequent release.

Q. Did you sign the original of that report?

A. Yes.

Q. Who typed it, do you know? A. I did.

Q. Yourself? A. Yes.

Q. Whereabouts?

A. At home. This was written after I had left, about a week after I left the Plant Rubber, I wrote this. Mr. Wright asked me to submit my final report, and I did about a week later.

Q. Was the original of that delivered to the Plant Rubber & Asbestos Company? A. Yes.

Q. Do you remember the circumstances?

A. I just remember that I went in with it to have my final talk with Mr. Wright, and made suggestions in connection with this report.

Q. Have you asked them if they had the original of this report? A. Yes.

Q. What were you told?

A. That they would look, and they did look, but it never was turned up; the files were not in such order as they are now, and nobody remembered how it would be filed. [427]

Q. So they were not able to find it at the time?

A. No, it might show up a little later, however.

Mr. Owen: I offer in evidence as Plaintiff's Exhibit 21 a letter written by J. A. Stadtfeld to C. A.

(Testimony of Jacob A. Stadtfeld.)

Wright, of the Plant Rubber & Asbestos Company on July 12, 1933.

Mr. Connor: I will object to the offer on the ground that it is not the best evidence. I do not think there is a sufficient showing that has been made to show that the original is not available. Mr. Wright is here, and they are going to call him. At the present time the proof of loss or whereabouts of the original I do not think is sufficient from this witness.

Mr. Owen: Mr. Wright has not been employed by the Plant Rubber & Asbestos Company for several years, and is no longer connected with them. This witness has called there and has made an effort to find it for him and they have not been able to find the original. I think there is sufficient showing that secondary evidence is proper. He wrote the letter, himself, on his own typewriter, and he certainly can identify it, and he says he delivered it there, himself.

Mr. Connor: I think that should be established by someone in the Plant Rubber Company who knows. I do not think we should be bound to take this witness' word that he made the inquiry. They are available, and they can be called.

The Court: He is under oath. I will receive it as Plaintiff's Exhibit 21. This is a carbon copy of that letter, is it? A. Yes.

(The document was marked "Plaintiff's Exhibit 21.")

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: Q. I call your attention to the third paragraph of that letter and ask you if that paragraph refers in any way to the subject-matter of the patent in suit?

A. Yes, it does, it refers [428] to the two Metalbestos.

Q. That is the pipe to which you are referring, the pipe of the Patent in suit? A. Yes.

Q. What did you mean when you "which I first submitted to you"? What period does that refer to?

A. That refers to the first week or two that I was with them on this second time of employment, in February, 1933.

Q. What did you do after you left the Plant Rubber & Asbestos Company in July, 1933?

A. I jumped around a lot then, Mr. Owen. I went to the Ace Sheet Metal Works and tried to interest him in making this pipe that Mr. Wright had turned down for the reason stated, and I think I stayed around there a month, possibly two months, and Mr. Derbyshire, the proprietor of the Ace Sheet Metal Works, did not want to go ahead. I then contacted, or Mr. Dutton contacted me. I had met him in Mr. Serbyshire's office and he was very much interested in the pipe, and after Derbyshire had expressed himself in the manner that he was not going ahead I saw Mr. Dutton, and he and I got together.

Q. In your letter to the defendant of July 17, 1933, you explained about your connection with Mr.

(Testimony of Jacob A. Stadtfeld.)

Derbyshire and you refer to a Duplex metal vent. Is that the same as Metalbestos? A. Yes.

Q. The pipe of the patent in suit?

A. Yes, with the exception, Mr. Owen, that when we first thought of making it out of sheet metal we were going to use one ply of air cell asbestos instead of two.

Q. What came of your contact with Mr. Dutton of the Standard Asbestos Company?

A. Well, we got busy right away and started to make up the pipe.

Q. Did you come to some sort of an agreement with him? A. Yes, immediately. [429]

Q. Do you remember what the substance of that agreement was?

A. I remember that I transferred to him all my right and title in the pipe, in return for which he agreed to give me, or the profits and losses were to be divided one-third and two-thirds, one-third my share, there being a certain stipulation in connection with the patent, which I think I previously discussed.

Q. I show you Plaintiff's Exhibit 10 and ask you if you have ever seen that before. A. Yes.

Q. Is that your signature? A. Yes.

Q. Is that the agreement?

A. Yes, that is a copy of it.

Q. Under that agreement you turned over all right in this invention to Mr. Dutton? A. Yes.

(Testimony of Jacob A. Stadtfeld.)

Q. Did you become a partner of his?

A. No.

Mr. Connor: I object to that, it is a legal conclusion, and I ask that it be stricken out.

The Court: Well, did you believe you were a partner?

A. No, I never thought I was a partner.

The Court: I will leave it stand in the record as indicating his own opinion, not a legal opinion.

Mr. Owen: Q. What was done, Mr. Stadtfeld, under that contract with Mr. Dutton?

A. We made the pipe and tried to sell it, and we sold some of it, and the cost was somewhat disappointing; we had figured out as best we could what this pipe was going to cost, maybe, and after we got our aluminum and galvanized pipe and assembled it with air cells we found that we had a cost quite a bit in excess of what we were supposed to sell it for, and it put us in a pretty bad position, so we naturally could not sell it and make any money, and we did not know what to do.

Q. Who made up the component parts for you, do you remember?

A. The component parts were made by the Williams Wallace Company. [430]

Q. Was the product readily received?

A. Yes, it was. I believe we got a very nice reception for the pipe, from the trade.

Q. What was the upshot of your deal with Mr. Dutton?

(Testimony of Jacob A. Stadtfeld.)

A. Mr. Dutton, after we went along for a few months, he realized that it was going to take a lot of money to put this thing over in the right way; in other words, he would have to put in equipment to make this pipe; we couldn't stand the other fellow getting a profit on the fabricating of the material that had to be done in the shop, where the pipe was completely made, and he did not believe that he had the money to put into the equipment, nor the necessary money to put into the procurement of raw materials in sufficient quantity to get the lowest possible price.

Q. Then what happened?

A. I was a free agent in the sense that Mr. Dutton had notified me that he could not go ahead, and for me to see what I could work up in connection with continuing with the pipe, and I believe that was in—I could not fix that date in my mind definitely.

Q. What happened when he told you you could do whatever you wanted with the pipe?

A. I contacted the Payne Furnace & Supply Company, I know.

Q. With what result.

A. With the result that I went down there. I was subsequently notified after I explained about Mr. Dutton's stand, that he could not continue, and I told the Payne Furnace & Supply Company that I would like to have them take hold of it and con-

(Testimony of Jacob A. Stadtfeld.)

tinue the manufacture. Mr. Dutton had previously told me that if I could make some kind of a deal whereby he would be relieved of his stock on hand, that he would turn over his full right and title to whoever might do that, so that I approached Payne on that basis, and while there was no agreement by Payne [431] to do that, he understood to get the full right and title he must take over all stock, and he attempted to do that, but did not do it.

Q. As I understand it, you explained to Mr. Payne that Mr. Dutton was willing to let him step into his shoes if he would take all of his stock?

A. That is right.

Q. Did you make any arrangement with the Payne Furnace & Supply Company for your working with them?

A. I never made an arrangement. The only arrangement that was made was that I was to get \$150 a month salary, that is the arrangement Payne made me, but my end of the arrangement was never carried out.

Q. What was that?

A. I had previously discussed when we were talking about this so-called Allumicell, I was asked in a letter on what basis I would go to work for them, and I wrote back on a one-third—two-thirds basis, a split was provided. That was not acknowledged, that is true, but Payne understood very clearly that I was coming down there on that one-

(Testimony of Jacob A. Stadtfeld.)

third—two-thirds basis, plus a stipulated salary. In our discussion I was given to understand that something along those lines would be worked out, and I implicitly trusted Mr. Payne, I had known him quite some time, and for that reason I never insisted on an increase—I wanted not so much to have the increase, which I could have used, that is true, but I did want something in writing to show what I would get in the future. I did not want the sales to mount way up before Mr. Payne decided on what he would give me.

Q. You refer to a letter you wrote to him. Was that when you were at Wayland's, or was that in connection with Allumicell?

A. I think that was when I was making all asbestos pipe with the Wayland Manufacturing Company; when I was making the Allumicell was when the reference to mutual satisfactory arrangements was made.

Q. Do you know where the title was to your invention when you went [432] with the defendant Payne? A. Yes, it was with Mr. Dutton.

Q. Had the Payne Furnace & Supply Company paid for any of the materials in developing any of the pipe in suit? A. No, not a nickel.

Q. Were you on their payroll when you invented it, the Payne payroll? A. No, positively not.

Q. Do you know of your own knowledge whether or not the defendant took over all of Mr. Dutton's

(Testimony of Jacob A. Stadtfeld.)

stock? A. I know that it did not.

Q. Did you know this when you were still down there in Los Angeles? A. Yes.

Q. Did you ever reach a definite agreement with Mr. Payne with regard to a royalty arrangement for you? A. No.

Q. Did you ever have any discussion with him or a definite arrangement?

A. I did on several occasions, either directly with Mr. El Roy Payne or Mr. Harry Payne, who was really my—I reported to Harry Payne practically directly, so that possibly it went through Harry to El Roy more than it went directly to El Roy, but I think I did bother him quite a good deal on that score.

Q. Did Mr. Harry Payne, or Mr. El Roy Payne ever express themselves to you with regard to securing a patent on your invention, or whether it was patentable?

A. Well, I turned over whatever I had done in the way of a patent to El Roy when I went down there. I think the patent application was turned over, and I wanted the patent matter to be followed through, naturally, because there was a thought on my part if a patent was applied for and granted that I could then bring this discussion as to royalty to a conclusion, and naturally he would want an assignment, and then I would be in a position where I could make a demand on the other of what you are going to do.

(Testimony of Jacob A. Stadtfeld.)

Q. When were you going to be in a position to give them an assign- [433] ment?

A. I would have to get clear from Mr. Dutton first.

Q. What did they have to do to get that?

A. They had to take all of his stock.

Q. What was said to you by Mr. Payne or by his brother, Harry Payne, in regard to getting a patent?

A. They said that they could not get a patent on it; I don't recall whether they mentioned Mr. Connor in the case, or not, but some search had been made and they were satisfied in their minds that a patent could not be obtained.

Q. Did they ever express any different idea while you were with them?

A. What do you mean by that—that a patent could be obtained?

Q. Yes. A. No.

Q. How long did you continue in their employ?

A. Until September 1, 1934.

Q. What did you do then?

A. I came back to San Francisco and contacted the Williams Wallace Company.

Q. Did you ever have any word from Williams-Wallace Company to come to them prior to your going to see them?

A. No. I had been there before when I was developing this pipe, I used to go in there to quite

(Testimony of Jacob A. Stadtfeld.)

some extent; I knew they were well-equipped to make this pipe.

Q. During what period of time did you used to go in there?

A. I went in there during 1932 and during the time that I was with the Plant Rubber & Asbestos Company, and then I suppose from then on, but I do recall in 1932 on account of that elbow.

Q. But in 1934, after you went down south with the defendant, did you have any communication from the Williams-Wallace Company to come to see them about your pipe? A. No. [434]

Q. I want to digress just one moment and show you Plaintiff's Exhibit 17, which states Plant Rubber & Asbestos Company, with the name J. A. Stadtfeld on there, and ask you if you remember ever having talked with Williams-Wallace Company about the subject-matter shown in that paper?

A. Yes, that is merely a quotation on 24 gauge aluminum pipe, and I got those quotations just prior to the time that I submitted the Metalbestos pipe to Mr. Wright. I naturally wanted to give him an idea of about what it would cost to make it. That is the reason I got these prices from the Williams-Wallace Company.

Q. And that aluminum pipe there was to be used in pipe of the type of the patent in suit?

A. It was to be used exclusively as an inner pipe of Metalbestos.

(Testimony of Jacob A. Stadtfeld.)

Q. According to the patent in suit? A. Yes.

Q. You say you went to Williams-Wallace Company. What proposition did you make to them?

A. I told them, of course, the whole story, how I knocked around, naturally they knew how I had been here and there and the other place, and I imagine that they did not think too much of this, anyway; however, I told them the story, told them about Mr. Dutton having the rights in this matter, and that I wanted to get started; I told them I was broke and the only thing I had left was this pipe, and naturally I tried to give them as good a sales talk on its desirable features as possible, and it had the effect that Mr. Wallace, I believe, went to see Mr. Dutton to find if all of the details I had given were correct, and I believe that he was satisfied to the extent that this agreement was brought to light, and Mr. Dutton told Mr. Wallace as he had told the Payne Furnace & Supply Company, that if he would relieve him—Mr. Dutton still had a bunch of this pipe, a lot of this pipe—if he would relieve him of all of this supply [435] I have on my hands I will turn my full right and title over and you can continue right where I left off.

Q. Did Mr. Dutton discuss this with you at all at the time the deal was made?

A. No, I was not a party to that. I merely conveyed to the Williams-Wallace Company my understanding and my knowledge of the circumstances surrounding the agreement with Mr. Dutton.

(Testimony of Jacob A. Stadtfeld.)

Q. Did Williams Wallace Company make an agreement with you?

A. Not immediately—a verbal agreement, but nothing in writing.

Q. Was that before or after they had been to see Mr. Dutton, if you know?

A. That was after they had been to see Mr. Dutton.

Q. What was the substance of the deal that Williams-Wallace Company made with you?

A. They agreed verbally to give me a royalty if and when a patent was granted; they agreed to apply for a patent, they agreed to take this stock off of Mr. Dutton's hands and also in connection with the possible royalty, if I were to receive one, when it was agreed, as has been previously stated here, it would be 25 per cent. of the net profit. Out of that they would deduct two-thirds to be paid over to Mr. Payne to satisfy his claim of \$800 for moneys expended in my development, and when he was fully paid then I was to be in the clear and receive my full royalty.

Q. Do you know whether the trade-mark "Metalbestos" was talked of after you went to work for Dutton, or was it before?

A. No, I think it was the same day, or, to be more explicit, it was about a week after I started that Mr. Dutton, I and a gentleman by the name of Sprague, who was with them, sat down and milled

(Testimony of Jacob A. Stadtfeld.)

over a lot of names that they had written down, and out of the bunch we took the name Metalbestos.

Q. Do you know whether an application was prepared for a patent on [436] your invention?

A. Yes.

Q. Did you sign it? A. Yes.

Q. At the time of signing that application did you also execute a formal assignment?

A. Yes, I did.

Q. To Williams Wallace Company?

A. Yes.

Q. Was that formal assignment made in pursuance of your agreement with them and their agreement with Mr. Dutton, or do you know?

A. Well, my assignment covered improvements, but that is all I could assign, because I had no other title or right to assign to them.

Q. What I am asking about now is your original invention, which Williams Wallace Company purchased the rights in from Mr. Dutton. Do you recall executing a formal assignment of that at the time you signed the patent application?

A. Yes.

Q. And then subsequently there was another assignment, was there, between you and Williams Wallace Company? I believe you just testified that it related to the improvements of your original invention? A. Yes.

Q. Is that Exhibit 11 that you have in your hand? A. Yes.

Mr. Owen: If your Honor please, might I excuse this witness for a minute and put on Mr. Wright, because we want to take him back over to Sausalito before lunch.

The Court: Have you finished with Mr. Stadtfeld?

Mr. Owen: No, I am not quite through. We won't be long with Mr. Wright.

The Court: If there is no objection that is satisfactory.

Mr. Connor: No objection. [437]

CHARLES A. WRIGHT,

Called for Plaintiff in Rebuttal; Sworn.

Mr. Owen: Q. Mr. Wright, were you at one time employed by the Plant Rubber & Asbestos Company? A. I was.

Q. Do you remember the years that your employment covered? A. I left there in 1934.

Q. Do you know Mr. J. A. Stadtfeld?

A. I do.

Q. Was he ever employed by your company?

A. He was.

Q. Was he employed once or twice, or how many times, do you remember?

A. I think that after leaving our employ he came back again after a four or five-month period.

Q. So that he was in your employ two different times? A. He was.

(Testimony of Charles A. Wright.)

Q. What was he employed to work on when he was with the Plant Rubber & Asbestos Company?

A. On the vent pipe called Vitex.

Q. Is that a vent pipe like Exhibit 20-A?

A. Yes.

Q. When he came back to work for you the second time do you have any recollection as to about when that was?

A. It was in the early part of the year, in February, 1933.

Q. In February, 1933? A. Yes.

Q. Do you remember why he was brought back?

A. He was brought back because we were having some trouble with the Vitex and was supposed to help to iron out that trouble.

Q. Did he, when he was back there at that time, submit any vent pipe other than Vitex for your approval? A. Yes.

Q. Do you remember the occasion?

A. He was working under me and I remember he did.

Q. You remember that he submitted another kind of vent pipe? A. I do.

Q. Do you remember the construction of that vent pipe?

A. It was a combination metal and air cell pipe.

[438]

Q. Metal and air cell asbestos? A. Yes.

Q. Do you remember any more about it than that? Can you describe it, in other words?

(Testimony of Charles A. Wright.)

A. I remember that the inner layer was of aluminum and the outer layer was of galvanized iron, and the joints worked in opposite directions.

Q. You mean there was a male and female pipe?

A. Yes.

Q. Was there anything in between the aluminum and the galvanized pipe?

A. Yes, asbestos paper.

Q. Asbestos paper? A. Yes.

Q. You say he submitted samples of the pipe to you? A. Yes.

Q. Where was it that he submitted the samples to you?

A. In the plant of the Plant Rubber & Asbestos Company.

Q. What was done with that pipe?

A. Well, it was left with me to investigate, and stayed in the company's office for a period.

Q. Do you remember about how long it was around your office?

A. I should say a month or two at any rate.

Q. A month or two? A. Yes.

Q. What was the decision that you came to and the other officers of the Plant Rubber Company with respect to that pipe?

A. We refused it on the ground it was more of a sheet metal job than an insulating job.

Q. Can you see from the witness stand there this pipe which is Exhibit 4? A. Yes.

(Testimony of Charles A. Wright.)

Q. Would you say that was substantially the construction of the pipe submitted to you in 1933?

A. I should say it was substantially the same pipe.

Q. After your company turned down this pipe presented by Mr. Stadtfeld, do you remember what became of these samples? A. I do not.

Q. Were they taken from your office, so far as you remember? [439]

A. Well, they were not left there.

Q. I believe you say they were around there several months?

A. Yes, a couple months, I should say.

Q. You remember about when Mr. Stadtfeld left your employ? A. Yes, I think in July.

Q. To go back just a minute, Mr. Wright, do you know if that pipe was built out of materials furnished by the Plant Rubber & Asbestos Company? A. I do not.

Q. You don't know?

A. No. I know the asbestos paper and lining was gotten from the Asbestos Company, but I don't know about the metal work.

Q. After Mr. Stadtfeld left he submitted a report to you, and I show you a copy, which is Plaintiff's Exhibit 21, which you may examine and see if you remember the substance of that report, or of such a report having been made to you?

A. I couldn't say.

Q. You don't remember? A. No.

Mr. Owen: You may cross-examine.

Mr. Connor: No cross-examination.

J. A. STADTFELD,

Direct Examination

(Resumed)

Mr. Owen: Q. When you went down to the Payne Furnace & Supply Company after having been with Mr. Dutton, of the Standard Asbestos Company, was any change made in Metalbestos, in the product structurally? A. No.

Mr. Owen: Q. When you were with the Payne Furnace & Supply [440] Company did you tell Mr. El Roy L. Payne or Mr. Harry Payne about your general financial condition?

A. Harry Payne, I did.

Q. Mr. Stadtfeld, are you familiar with most of the flue pipes on the market to-day, at least those that are accepted by various cities and building inspection departments?

A. I feel that I am.

Q. About how many flue pipes are there that are acceptable?

A. Do you mean nationally, or locally, or what?

Q. Take the Pacific Coast as typical.

A. There would possibly be ten or a dozen.

Q. How many of those are metal vent pipes?

(Testimony of Jacob A. Stadtfeld.)

A. The only metal vent pipe that is generally accepted on the Coast for gas is Metalbestos.

Q. Is that the product put out by the defendant as Payne-A-Vent pipe? A. Yes.

Q. And the product covered by the patent?

A. Yes.

Q. What is the relative difficulty of assembling the pipe of the patent in suit compared, say, with Vitex or Transite and all these other competitive acceptable, I mean acceptable to the cities, flue pipes?

A. The difficulty in joining would be more in this type of pipe for the reason—

Q. You mean on the Transite and Vitex?

A. I do not consider that there is any difficulty in assembling or joining Metalbestos or Payne-A-Vent. The difficulty would be in the assembling and joining these pipes, they have to be cemented, they are heavy; they take stronger supports than the Metalbestos or Payne-A-Vent pipes, and there is not always an assurance that these joints are leak proof against moisture, at least they do leak.

Q. Do you know of your own knowledge whether there has been much of an effort besides this effort of yours to solve the problem, of your own knowledge?

A. There has been some effort, but not too much. Transite pipe, for example, made by Johns-Manville [441] Company, is not made, nor never was intended when it was originally put out, to be used

(Testimony of Jacob A. Stadtfeld.)

for a gas vent; it is incidentally used for that purpose, and it is an underground conduit, practically.

Q. I believe you testified it is not successful as a vent pipe?

A. Not in the sense it overcomes all objections generally raised by the installer of a gas appliance.

Q. Have you examined the patents set up by the defendant in this case as anticipating your invention?

A. I have looked them over.

Q. Will you refer, please, to the patent to Aldrich, 340,691, and state whether or not that discloses a pipe suitable for a vent pipe?

Mr. Connor: Pardon me, do I understand, Counsel, you are producing Mr. Stadtfeld as an expert on patents?

Mr. Owen: Simply as a practical expert to explain the structures as they affect the invention.

Mr. Connor: You had better lay a foundation. It is objectionable, so far, from this witness' testimony.

Mr. Owen: I believe his long experience with flue pipes should qualify him.

The Court: He has stated there about a dozen different kinds of flue pipes that are acceptable. He says there are only a dozen in use and he is familiar with them. I will allow the question.

A. This patent relates to steam pipe and boiler covering. I see the patent shows the pipe to be covered was an outer casing and inner casing, but

(Testimony of Jacob A. Stadtfeld.)

there is no slidable feature with respect to the inner and outer casing. In fact, the insulation between the two pipes is fastened and held into those two pipes by a bolt. That makes it impossible to telescope one member on the other.

Mr. Owen: Q. Do you find opposite male and female ends on [442] those two concentric pipes?

A. Not opposite, no. They run the same way, Mr. Owen.

Q. Do you think that that pipe shown in the Aldrich patent could or could not be used as a flue pipe satisfactorily, speaking as a mechanical man?

A. No, it is not practicable in any sense, no. If it were used, of course, in the first place, the cost would be prohibitive, to use this as a flue pipe; it would cost you, the way it is set up in this patent, five or six or seven dollars a foot; if it were erected you would have a leakage of the moisture from without or from within into that insulating space, and it would disintegrate or ruin the insulation.

Q. When you read the specification of the Aldrich patent, or can you now find in there any thought or suggestion of the solution of the problem solved by the patent in suit?

A. I do not see any relation of this patent to the Metalbestos patent; it is a different article of manufacture, entirely.

The Court: Q. You see no solution?

A. No.

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: Q. Will you refer to the patent to Welch, No. 1,927,105? A. Yes, I have it.

Q. State whether or not that discloses a flue pipe or a pipe suitable for use as a flue pipe?

A. This is a pipe to prevent freezing of liquid. It is a rubber-lined pipe. Heat would put it out of the running for a vent pipe.

Q. Why?

A. Rubber would not last under heat for any length of time, in fact, it would be dangerous; you cannot always control the heat within a gas vent or flue pipe, and should it run up to 800 degrees, as sometimes these pipes are tested at that temperature, the rubber would catch fire, and it would be a very hazardous condition from that standpoint alone.

Q. Do you find the provision of slidability of sections? A. None, whatever. [443]

Q. Do you find any opposite male and female joints?

A. No. It is a screw type connection.

Q. Will you refer to the patent to Meade, No. 1,428,294, and state whether or not that patent discloses a structure suitable for a flue pipe?

A. This is a stovepipe thimble. This is what is supposed to protect the flue pipe where it comes near or in contact with combustible material. This is not according to the invention a flue pipe. He shows the pipe running from this——

(Testimony of Jacob A. Stadtfeld.)

Q. Where does it show that?

A. The dotted lines. I guess those are on the drawing; that dotted line running through here shows the pipe to run through this thimble; that represents the flue pipe, it is a dotted line.

Q. You mean like the patent in suit shows?

A. Yes; where it passes through the floors or ceiling or walls it is made of combustible material.

Q. Will you refer to Exhibit 4 and point out upon this exhibit the thimble?

A. Yes, the thimble is the metal piece, and it is just telescoped in construction; in other words, you could pull the rear section out and take the whole thing apart. This is the very thing that answers the very same purpose as this thimble in the Meade patent; it is simpler in construction, that is true, but the function of it is to keep the pipe, itself, away from combustible material. It is not a pipe.

Q. Do you find in this Meade construction any opposite male and female joints such as the structure of the patent in suit shows?

A. There are no joints, whatever provided, Mr. Owen, whether male or female. They are all female ends, as a matter of fact.

Q. In the Meade patent is there any teaching of the essence of the invention of the patent in suit?

A. They have a little insulation between the members, but as I said before it is not a [444] pipe, it is merely a protective pipe running through or in close contact with combustible material; it could

(Testimony of Jacob A. Stadtfeld.)

not be erected as a pipe in the form of construction as disclosed here, because, as I see it, these thimbles are adjustable to various wall thicknesses, and in that case they could be pulled or slid together, but using them as a pipe, setting one on top of the other in a vertical line, there is nothing to support this thimble, and it would merely collapse, and you could not erect it as a pipe.

Q. Now, turning to the patent to Hammill, No. 311,750, do you find there a flue pipe structure described and shown?

A. No, this is simply a pipe covering or insulation; there is nothing telescopic in connection with either the pipe—it proposes putting this insulation around after it is applied to the pipe. There is no provision for joints, merely a form of insulation.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until two o'clock p. m.)

(Testimony of Jacob A. Stadtfeld.)

Afternoon Session

J. A. STADTFELD

Direct Examination

(Resumed)

Mr. Owen: Q. Would the structure shown in this Hammill patent make a practical flue pipe?

A. No, it would not.

Q. Why not?

A. There is no provision for joining the pipe. There is only shown an inner metal tube. The outer is of asbestos, so that exposed to the water the whole insulating mass would become saturated and therefore lose its insulating properties. There is nothing telescopically arranged in so far as the insulation of that metal pipe is concerned. In fact that inner metal pipe is wrought iron pipe; it is steam or water pipe with the insulation fixed firmly to its outer surface.

Q. That is the Hammill patent to which you have referred? A. Yes.

Q. Do you find in that Hammill patent a composite pipe construction comprising an outer tube—do you find there an outer tube?

A. There is no outer metal tube.

Q. What is that outer part?

A. That is merely a wrapping of asbestos paper.

Q. Then inside of that do you find one or more layers of insulating material? A. Yes.

(Testimony of Jacob A. Stadtfeld.)

Q. Then do you find an inner tube slidably located inside with insulating material?

A. No. The provision, according to the patent, for applying this particular form of covering for steam pipes is to wrap this with paper which has cloth on its surface, and it is very specific in mentioning muslin or strawboard, which is coarse granulated cloth which is fixed to this pipe by some adhesive and wound around the pipe so that it becomes you might say an integral part of the pipe that is for *simulation* by its application. [446]

Q. Do you find disclosed by Hammill, or suggested anywhere in the specification, the idea of that pipe being made in sections so that the inner and outer pipes of each section have male and female ends?

A. No. This form of insulation is to be applied to a steam pipe that is already erected, or pipe line, whether it is hot water, or steam, it is a heat insulator, and after these wrought iron pipes are in place this material is wound around and around until it is filled up to the desired thickness.

Q. Would this pipe in the Hammill reference pass any present-day building ordinance for use as a flue pipe?

* * * * *

Mr. Owen: I am perfectly willing to limit it to California, because California has good building laws.

A. No, it would not be allowed to be used in California.

(Testimony of Jacob A. Stadtfeld.)

Q. Will you turn to the patent to Meade that you referred to before lunch and state whether in this Meade disclosure there is any suggestion or showing in the drawing of a composite sectional pipe for venting fluids or gases of combustion having adjacent ends of the inner and outer pipe of each section with male and female ends—do you find that?

A. No, there is no such provision in it.

Q. What type of joint would you get with *Meade* if you tried to superimpose one section on another?

A. You would merely get what we call a butt joint, with no section of either pipe going [447] into the other adjoining section.

Q. Would that make a leak-tight joint?

A. Absolutely not.

Q. In Meade, would you have with each section of connected pipe the outer and inner independently supported and maintained in connected relationship?

A. No, there is no provision for it to be independently supported. When this Meade stovepipe thimble is placed on end it of its own weight collapses to the extent of the length of the outer section of it.

Q. Now, would you say that the Meade construction would pass any present California building ordinance for use as flue pipe?

A. No, it is not even intended to be a flue pipe, of course not.

(Testimony of Jacob A. Stadtfeld.)

Q. Now, will you turn to the patent to O'Toole, No. 878,014, and of this the defendant has produced a model, Exhibit 22, and state whether or not that discloses a pipe construction which would be suitable for use as a flue pipe?

A. No, very definitely no.

Q. What are your reasons for saying no?

A. Here is the first reason, and a big reason. There is no provision for a joint on this inner aluminum tube, and that merely butts up against, and it is evidently just placed in there to hold this sheet of asbestos up against the outer galvanized casing. This is a warm air pipe, and that was Mr. O'Toole's idea of it when he invented it.

Q. A warm air pipe? A. Yes.

Q. What would happen if that O'Toole pipe were used as a flue pipe?

A. Well, the open seam, here, even though that might butt up against as tightly as it could, it would still allow the condensate to leak into this asbestos part and through a wick action it would naturally be absorbed all through the whole mass or layer of asbestos, leaving it mushy, in fact leaving nothing at all besides that. The condensate would eat through the galvanized field.

Q. Would the flue gases be confined within that inner tube, or [448] what would happen?

A. The flue gases in this case would be confined within the outer tube. They pass through from the inner tube through the liner into the outer tube. In

(Testimony of Jacob A. Stadtfeld.)

other words, with this opening here you have nothing to prevent escapement of moisture or gases.

Q. Will you look at the picture in Fig. 3 of the patent, the one which shows two sections are joined, and state whether or not there would be a pipe not only leak-proof from moisture from the outside, condensate from the inside, and also flue gases?

A. This joint, in the first place, is shown to be in reverse position to what it should be in so far as conveying burned gas is concerned; in other words, the metal end of the underlying section is pointing up and the female end naturally comes down over that to make that joint. That is all right for protection against rain getting in, because it would shed on the outside, but the condensate from the inside will naturally leak out at the point where the metal end protrudes from the section above, and also this pipe must be riveted at the joint in order to hold it in a substantially firm position; in the case of flue pipes, here is a standard size, 4-inch—I guess more 4-inch gas vent pipe is sold than any other size, and I have got a pretty good arm, I could not get in this to lift it at the lower end, here, and that is what would have to be done to conform to the method of installation as disclosed by the patent.

Q. Then what conclusion do you draw from that as to its practicability?

A. It is absolutely not practicable for use as a gas vent pipe.

(Testimony of Jacob A. Stadtfeld.)

Q. Now, the joint between the intersection 2, where you have one on top of the other, shown in Fig. 3, what type of joint is that?

A. That is a riveted joint.

Q. As to one section on top of the other, what type of a joint is [449] it? I am speaking now of the inner liner, 2.

A. The inner liner merely butts, and it is just joined where the seam would ordinarily be.

Q. Do you find any male and female joint there?

A. No, none, whatever.

Q. In the sense of the patent in suit?

A. No.

Q. Now, continuing to look at the O'Toole patent, do you find there an inner pipe construction in which the adjacent ends of the inner and outer pipe of each section have male and female ends?

A. No.

Q. Do you find that the male end of the inner pipe is located opposite to the female end of the outer pipe? A. No.

Q. Do you find the male end of the inner pipe pointing downwardly and fitted inside the female end of the adjoining lower section?

A. No. There is no male end in either the inner or outer section of the pipe.

Q. Do you find there a string of connected pipe, inner and outer, independently supported and maintained in connected relationship? A. No.

(Testimony of Jacob A. Stadtfeld.)

Q. Now, let us turn to the Harvey patent, No. 534,473. Will you state what that patent shows?

A. This shows a conduit for steam or hot water. It is really for underground work. The method of installing underground pipe lines is to dig a trench and lay the pipe first and then apply these various jackets, section by section, and I notice in this case they make no provision for sliding these pieces over the couplings of the threaded pipe.

Q. You are referring to the coupling there about the middle of the drawing of Fig. 1? A. Yes.

Q. Going back for a moment to that O'Toole reference, and the structure in Exhibit 22, would that structure pass any present day [450] California building ordinance as a practical flue pipe?

A. Absolutely not.

Q. No, turning to Harvey, do you find in Harvey a construction suitable or adaptable to use as a flue pipe? A. No.

Q. What reason can you give for your answer?

A. Well, first of all, too costly, secondly it would be almost impossible to erect this type of pipe within or outside of a building.

Q. Do you find in Harvey that the sections of this pipe, the adjacent ends of the section come substantially on a line?

A. No, there are no adjacent ends, as I see them.

Q. Do you find there any male and female ends so that each section would have a male with a female on each end?

(Testimony of Jacob A. Stadtfeld.)

A. No. It is entirely different. As far as the pipe, itself, is concerned, the inner wrought iron pipe is a standard threaded pipe with couplings for joints.

Q. Do you find in Harvey any structure shown or suggested in the specifications that would teach the making of a flue pipe that would pass any present-day California building ordinance?

A. Substituting that inner wrought iron pipe for terra cotta, you might have what is commonly called patent chimneys.

Q. What is a patent chimney?

A. That is terra cotta, or some type of burned clay pipe which is erected on a job and they slip a metal casing over it with all the way from one-inch to two-inch air space between the casing and the outer wall.

Q. How long has that construction been known?

A. Long before my time.

Q. What is your answer?

A. Long before my time.

Q. Is that an efficient type of chimney?

A. Not for gas.

Q. Do you run into competition with that with the Metalbestos flue pipe of the patent in suit?

A. We do and we do not, Mr. Owen. [451] They use it where an appliance installer wants to get the highest efficiency of his appliance and hesitates hooking in, as we term it, to a terra cotta flue in just the same manner he would hesitate to hook it

(Testimony of Jacob A. Stadtfeld.)

into a brick chimney, for the reason that the dense cold wall results in the condensing of the gases quicker than anything else.

Q. Will you turn to the Savage patent, that is 500,779, and state what that patent discloses?

A. This is a fireplace chimney or smokestack, a built-up pipe on the job. He provides, first of all, a cast steel or cast iron plate. As a starting medium there is a ring on that, but it does not show in such position as to in any manner hold the two pipes, or either one of the pipes in any sort of central position. Evidently the inner pipe is set approximately on center, first, and then the outer pipe is placed around it, and in the space between the two is tamped some type of insulating material, and it is the tamping of that material in the space between the two pipes that is supposed to hold them in permanent position.

Q. Do you find there a construction having an outer tube? A. Yes, there is an outer tube.

Q. Do you find there one or more layers of insulating material located around the inside surface of that tube?

A. He does not specify layers. He specifies the material that can be tamped and that naturally would be of granular form.

Q. Do you find an inner tube slidably located inside of that insulating material?

(Testimony of Jacob A. Stadtfeld.)

A. It is not slidable when this material is tamped, because it has to be tamped in there with the idea in mind of holding the pipes in permanent position.

Q. Is there anything about the construction of that inner section B that would prevent it from sliding?

A. Well, there is a flange turning outwardly, and once that material is tamped in around [452] there that would act as a stop against any movement of that inner pipe, even if they wanted to pull it out, it is not intended to slide in the first place.

Q. Do you find, taking Fig. 1, the lower, the inner section B and the next adjacent upper inner section which is not lettered, do you find that there is any connection between those two sections?

A. No, he provides purposely a space to allow for the expansion and extraction of the inner tube due to the heat.

Q. Now, then, looking at the outer pipe, what kind of a joint do you find there between the adjacent sections?

A. This is shown to be a butt joint with a collar around the two ends of the pipe to hold them in permanent position.

Q. If this Savage type of construction were made up and sent out on the job with the tamped material in there could you slide down the inner section in order to make it fit the inner section before making the fit of the outer section, as you do in the pipe of the patent in suit?

(Testimony of Jacob A. Stadtfeld.)

A. No, the least little movement of that inner tube would disturb the packing that is in there to hold them—that would be in there to hold the two pipes in position, and to begin with there is no provision for male and female connections at all; it is merely the outside. It does not seem to touch; the top section does not touch the underlying section at any place.

Q. Would this Savage construction pass any of the present-day California Building Ordinances for flue pipe?

Mr. Connor: That is calling purely for a conclusion.

Mr. Owen: This witness is testifying as to experience and his knowledge of the ordinances, and whether it shows a construction that would pass.

Mr. Connor: If you do not object, I will examine the witness [453] on voir dire for the purpose of making an objection.

Q. You do know, do you, that every flue vent construction that comes out must be submitted to the authorities for approval?

A. In most cases.

Q. All of these various vent pipes that you have discussed have gone through that stage?

A. Yes.

Q. If you produced a vent pipe here under consideration in the Savage pipe, and all the others, you would have to go through the form of approval

(Testimony of Jacob A. Stadtfeld.)

and wait to find out whether or not they would be approved?

A. Yes, you would have to submit them for test.

Mr. Connor: I object. The witness does not know whether it would be approved or not approved.

The Court: I will let him state his opinion.

Q. Have you had experience in that and know?

A. Yes.

Q. Have you seen them approved and disapproved, some of these?

A. What *was* you wanted me to answer?

Q. He asked you what your opinion was on this subject.

A. That was in connection with whether it would be approved for use?

Q. Yes.

A. No, it would not be approved for use for the reason that the inner pipe, having no connection that would allow for the escapement of the condensate and the burned gases into the so-called insulated space, the burned gases at first would not make so much difference, that is, the escapement at that point, but as the condensate got in there, allowing this to crumble or fall through absorption, then it would leave an open space where it would be dangerous for the burned gas to get into the space and so escape through the outer joint, which is inadequate in that case, that is, in the case of the

(Testimony of Jacob A. Stadtfeld.)

gas vent in any habitable [454] quarters, or where it might become a menace as far as life and health are concerned.

Q. Let us go back a moment to the Aldrich patent No. 340,691. I will ask you the same question with regard to that construction.

Mr. Connor: The same objection.

The Court: The same ruling.

Mr. Connor: Exception.

A. I have already testified, Mr. Owen, that the joints were inadequate, that condensation from the inside or rain from the outside would work into the insulating material, causing it to disintegrate, crumble, or become so heavy due to absorption that it would leave an open space where the gases might enter and so escape through the outer shell into the habitable quarters.

Mr. Owen: Q. Have you read the transcript of the Los Angeles depositions taken in this case?

A. Yes.

Q. Do you understand them?

A. I feel that I do.

Q. Did you examine that photograph introduced as an exhibit in that case? A. Yes.

Q. Did you also examine the piece of pipe known as the Baker pipe, that is Exhibit G? A. Yes.

Q. Did you notice anything about that pipe that would indicate to you that it was not functioning efficiently?

(Testimony of Jacob A. Stadtfeld.)

A. Yes, I did; immediately I noticed that the inside of it was heavily coated with a deposit of carbon or soot.

Q. I will show you two pictures, Exhibits 2-A and 2-B, which show that big pipe Exhibit G, and ask you if that is what you call a sooted condition, or is that a normal condition of an efficient gas vent?

A. I should say it is a very unusual condition of a gas vent functioning in the proper manner; in fact, it could not have been functioning in the proper manner or we would not [455] have that carbon deposit.

Q. What does that indicate to you as far as proper flue construction is concerned?

A. It indicates that the combustion of the burner of whatever appliance this was hooked to was not functioning properly; in other words, there was not a proper draft to insure proper combustion; the only time that you should or will get a sooty condition like this from an appliance burning gas is when that floating flame prevails where you are not getting the proper combustion.

Q. On page 122 of the Fox deposition with regard to the alleged Evans prior use, the witness said one of the boys from the shop took it down because the heater was sooted up, and they took it down. Does that indicate to you a similar condition on that flue? A. Absolutely.

(Testimony of Jacob A. Stadtfeld.)

Q. Do you know whether or not the trade was very quick to pick up the patent in suit once it came on the market?

A. They were a little skeptical.

Q. Do you know why that was, do you have an idea?

A. There had been so many coming and going, there had been so many on the market and they had failed, and caused a considerable trouble and expense, they naturally did not look with as quick favor on it as they otherwise might have on something new coming along again.

Q. Would you say that the devising of a successful pipe was considered a problem in the flue industry?

A. It was most certainly.

Q. Has it ever been solved? A. Yes, it has.

Q. By what? A. This Metalbestos.

Q. Do you remember the month or year when you first learned that claims were going to be allowed by the patent office on this invention?

A. I think it was about in May or maybe June of 1935. [456]

Q. Do you remember whether you stated anything about it in the trade?

A. Well, I naturally did. I was so tickled that the claims were allowed I believe that I broadcasted it all over.

Mr. Owen: That is all.

(Testimony of Jacob A. Stadtfeld.)

Cross Examination

Mr. Connor: Q. How long, Mr. Stadtfeld, has the trade been able to purchase sheet aluminum of the type that was used in the manufacture of these gas vents?

A. How long have they been able to purchase it?

Q. That is, of the class of aluminum that is being used at the present time?

A. Well, I really could not tell you on that, Mr. Connor, but I do know that when I first became interested in it it was obtainable.

Q. That is of the same class, same degree of—

A. Yes.

Q. You had experience in testing out aluminum that pitted due to acid condition of the condensate?

A. Yes.

Q. Do you definitely know about how long that type of aluminum has been manufactured by the Aluminum Company of America?

A. I am not sure, I answered that previously, how long they have been making it. I know it was obtainable when I first examined it.

Q. Well, comparatively recent years, isn't it?

A. I wouldn't even answer that.

Q. Isn't it a fact that the use of aluminum inner pipe contributed more to the success of this vent pipe than any other one thing?

A. I would not say it was. It is a big factor, in so far as its success is concerned, but the aluminum

(Testimony of Jacob A. Stadtfeld.)

without the other component parts would not be worth anything.

Q. You have, of course, testified here sufficiently to consider yourself an expert along the lines of vent pipe—

A. Yes. [457]

Q. Have you or not had considerable to do with obtaining the acceptance of these vent pipes by municipalities, communities, or building associations?

A. Well, I have gone pretty well over that, I think, yes. I did with the Plant Rubber Company; I did to some extent with Mr. Payne when I was with him, and since I have followed through, I have had the same line of work to follow along with.

Q. You have examined your vent pipe, Exhibit G, attached to the depositions, have you?

A. Yes.

Q. Would you say that that vent pipe would be acceptable to-day, providing the inner tube was made of aluminum?

A. I would say it would not be.

Q. What is the difference between that Exhibit G and the Metalbestos as it is manufactured now?

A. This is, so far as my opinion is concerned, what we call a thimble. It does not—it has to be a continuous pipe, it does not provide connection of the outer and the inner section; so the pipe should be aluminum if it were a composite pipe outside of a building so it would be immune to the rain water getting in at the joints, nor would it disallow the condensate from escaping.

(Testimony of Jacob A. Stadtfeld.)

Q. Well, you certainly can say whether or not it very readily could be made in a section and of a considerable length of pipe made out of several sections, can't you?

A. I can say how it should have been, but I don't see how it was.

Q. Well, I am speaking now of the particular joint, of the material used for the inner pipe, Exhibit G, before aluminum, would that not be acceptable to most of these communities which you have testified regarding?

A. In other words, if the inner pipe such as you show in your Exhibit G was aluminum and if that is surrounding by the same type of insulation—

[458]

Q. No. Forget the aluminum.

A. No, I would say it would not be acceptable.

Q. Would the Metalbestos vent pipe without asbestos between the pipe, has that been accepted?

A. Yes.

Q. It is acceptable in the building ordinance of the City and County of San Francisco? A. Yes.

Q. That is true in Los Angeles? A. Yes.

Q. The only difference then would be the lack of asbestos and yet it has been approved without the asbestos, as you testified? A. Yes.

Q. Do you contend that it still would not be approved without the particular type of joint between sections that you have just mentioned?

(Testimony of Jacob A. Stadtfeld.)

A. I say it would not be approved.

Q. Has not been approved?

A. Would not be approved. I thought that is what you asked me.

Q. I was asking you if the inner tube were made of aluminum would it not be——

A. May I look at it?

Q. Yes.

A. In the first place, you would not have sufficient insulation with this pipe to get by any testing laboratory.

Q. What do you mean?

A. I mean that they apply from 800 to 1200 degrees, and we will take 800 degrees of heat inside this pipe, and it would never get by.

Q. Why wouldn't it?

A. Due to the confinement of this little air space, here.

Q. If the air spaces were enlarged, do you then think it would be approved with the inner tube of aluminum?

A. Providing you have the proper joint.

Q. You mean with several joints together?

A. I mean the same construction that we use in Metalbestos, of providing male and female joints.

[459]

Q. Well, what I want to get is an answer to this question: Considering that the inner tube on Exhibit G is made in proper size, proper spacing, you

(Testimony of Jacob A. Stadtfeld.)

say that pipe and the inner pipe made of aluminum, that pipe would be acceptable if it had the particular joints specified, namely male and female joints?

A. If you are trying to get me to say it is acceptable, no. This is not. It is not a type intended for a continuous insulation. This is merely an insulating member running through a certain portion of the building.

Q. That is all right. Am I correct, then, in understanding you to say that the only reason why it is not acceptable is because it is not an inner tube of aluminum, or it has not the male and female joints, is that correct?

A. And it is not properly insulated.

Q. Well, by increasing the space of the pipe——

A. (Interrupting) Oh, you have not done it here. You do not have that there.

Q. I am trying to get around your distinction. I want you to specify what you contend your distinction is between this pipe and the present Metalbestos pipe which is sold to the trade without the asbestos?

The Court: What is lacking?

A. Well, your Honor, this is not a section of vent pipe. It is merely a portion of a vent pipe that has been insulated where it runs through or near combustible materials. I think I understand what Mr. Connor is trying to get me to say but I am not—this is not a composite pipe intended to be

(Testimony of Jacob A. Stadtfeld.)

erected one section on top of another. It is only an insulating member that runs through or close to the combustible material.

Mr. Connor: Q. Well, that is what I am asking you. I am trying to save time. The only distinction then that you make between this pipe here, disregarding size, and the approved metalbestos without the asbestos lining is the joint at the end of [460] the tube, is that it?

A. I will answer by saying I have not made a comparison between this and Metalbestos. I conscientiously cannot make any comparison.

Q. You have not said why yet. You specify these various joints at the end of the tube. Isn't that a matter of common practice, putting pipes together in that way; hasn't it always been common practice to make a water shedding joint in the direction in which the flow of moisture is coming?

A. Might have been practice so far as single pipes are concerned, but there has never been a pipe, or double construction, or composite pipe construction as we have in Metalbestos on the market, so I cannot assume it was common practice, for the reason there never was a pipe that was erected in the manner that we are erecting Metalbestos.

Q. How is Vitex coupled, with the collar up or down?

A. Vitex had the collar up in all cases.

Q. In other words, you have a water-shedding joint, I understand, so the pipe sheds condensate—

(Testimony of Jacob A. Stadtfeld.)

A. We thought we did after we had the joint cemented, but we cannot say we did or we didn't. Our main thought was to have the condensate drip down on the side wall. That was more important to us than to try to keep out the water from the outside.

Q. The purpose for setting the pipe and setting the next upper section down into it was to shed water down that pipe, wasn't it, instead of coming out up over the joint?

A. No. It was to make sure the condensate slid over the joint and along that underlying section.

Q. Yes. A. Yes, but not the water.

Q. Well, whatever the moisture is. Then you merely duplicate that on the outside of the pipe to shed rain, the same principle as, I think you said, on shingles.

A. Yes, but you are referring to [461] Vitex now.

Q. No. I am speaking of Metalbestos.

A. Yes, to shed it shinglewise, yes.

Q. If you put an outer tube on Vitex you make the same kind of a joint?

A. Yes, you would if you did that.

Q. How long has the plaintiff been selling Metalbestos of the type in evidence, Defendant's Exhibit 25, without the aluminum insulating material in it?

A. Well, we have always sold it with the insulating material in it.

(Testimony of Jacob A. Stadtfeld.)

Q. I asked you how long the Plaintiff has been selling it like Defendant's Exhibit 25?

A. I cannot answer that accurately, Mr. Connor, but I would say roughly a year and a half, or it might be two years.

Q. Has the plaintiff during that period of time sold vent pipe with the asbestos insulation in it?

A. Yes.

Q. In what quantity?

A. I will have to refer to the records on that. Of course, at first all of the pipe that we sold was of that construction, and we have always continued to manufacture—we have a call for it right along. We have always made it—we have always had it in stock, but we have not—I will say we have not sold nearly as much of it as we have this type of pipe.

Q. Comparatively, there is none of it sold, though?

A. Comparatively, that is true.

Q. It is only the Metalbestos pipe without the asbestos insulation in it that has been approved by the building departments of San Francisco and Los Angeles?

A. Yes, so far as we are concerned.

Q. Also the Pacific Coast Building Trades Council.

A. Building Officials Council.

Q. You speak of the cost of installation of metalbestos being [462] cheaper than the other form. As a matter of fact, isn't Metalbestos a more expensive type of pipe to install than the other forms?

(Testimony of Jacob A. Stadtfeld.)

A. Not to install. It is more expensive than many types of material on the market so far as the cost of material is concerned, but from our angle, and we make other installations of our product, it costs far less to install than, for example, either of those two types of pipe, far less than terra cotta.

Q. Take Vitex, for example; all you do is stand that up, one section on top of another, cement the joints, and at about every second stand you put a band around it, line it up with the building——

A. Yes, and cementing those joints is not as easy a job as you might think.

Q. Isn't it a fact with Metalbestos you have to drill holes or use screws to put a band around Metalbestos at every joint?

A. No. The good practice would be prior to installation to use metal screws, however——

Q. Isn't it always done that way?

A. No, it is not.

Q. How many jobs are installed——

A. You know, we make it in ten-foot lengths——possibly you overlooked that—for the average job. You take a bungalow in your section of the country, a ten-foot length and a three-foot section, that is the end of the job. If it is an outside vent you don't have to use any more metal on bracing or handling of the sections and you make the installation in good time.

Q. What type of pipe were you experimenting with for Payne during May and June, 1932?

(Testimony of Jacob A. Stadtfeld.)

A. That was all asbestos pipe with cellophane and some aluminum foil wrapped in with the asbestos, some of the lining.

Q. You did not develop this particular invention you claim prior to sometime toward the end of 1932, I believe?

A. Along the latter [463] part of 1932, yes.

Q. There has been a report introduced in evidence as Plaintiff's Exhibit 21, made to Mr. C. A. Wright, General Manager of Plant Rubber & Asbestos Company, dated July 12, 1933, in which you refer to a certain pipe. I will hand you a copy of another report dated March 14, 1933, and ask you if you know anything about that report.

A. Yes, I remember this report.

Q. That refers to a different vent pipe than is referred to in this report of July 12, 1933?

A. Well, this entire report is not devoted to any particular type. I had given Mr. Wright my recommendation. I was hired to produce something that they could put on the market even in place of Vitex on a permanent basis, a pipe where they would have no more trouble with it. I reached my conclusions, and this is at the end of—in fact, after I had left—this is during the time of employment.

Q. You testified Exhibit 21 refers to Metalbestos. Will you point out there where it is referred to?

A. "The pipe which I first submitted to you and which I again made just before leaving is, I feel sure, the answer to your problem and I am sorry

(Testimony of Jacob A. Stadtfeld.)

that this was not accepted for the good of the company as well as myself.”

Q. Is that a different pipe than referred to in the report of March 14th?

A. In this report there is no mention made of the metal pipe. I submitted that to Mr. Wright in the first week or so after I went back, that would be in February, and then after he discarded the idea as to it being a job for a sheet metal company then I put my heart and *sole* into Vitex, and this refers entirely to Vitex.

Mr. Owen: By “this” the witness refers to the earlier report of March 14th. [464]

The Witness: Yes.

Mr. Connor: Q. Was the Metalbestos pipe developed between March 14th, 1933 and July 12, 1933? A. No; prior to that, Mr. Connor.

Q. Prior to March 14, 1933?

A. In February, 1933.

Q. Then these recommendations here were not for the use of Metalbestos?

A. No. These recommendations had nothing to do, because the first pipe I really submitted as a substitute for Vitex was this, as we now call it, Metalbestos.

Q. Exhibit 21 of the Plaintiff?

A. Well, I refer to this.

Q. The third paragraph of Exhibit No. 21 is what you contend referred to Metalbestos?

A. Yes.

(Testimony of Jacob A. Stadtfeld.)

Q. March 14th report does not refer to Metalbestos in any way? A. Not in any manner, no.

Q. Now, I want to know why there is no mention of Metalbestos in the report of March 14th?

A. Mr. Wright had taken the samples, looked at them, and I believe even submitted them, or had Mr. Shainwald, the President of the Paraffine Company, who then owned the Plant Rubber, look at them, and they decided it was a job for a sheet metal shop and not an insulating material company, so that was discarded.

Mr. Connor: I will offer the report dated March 14 referred to by the witness as Defendant's next exhibit.

(The document was marked "Defendant's Exhibit 27.")

Mr. Connor: Q. Was the aluminum bought by the Plant Rubber & Asbestos Company in, I think, February of 1933, purchased solely for the purpose of experimental work, or for making pipe?

A. It was mainly experimental at that time, although we did make up some. We had a test stack, as we called it, and some of that was evidently made up for the test run at that plant. [465]

Q. Have you any idea, after going over to Mr. Dutton, at the Standard Asbestos Company, how much vent pipe was actually sold prior to making that Metalbestos.

A. There was not very much, Mr. Connor, because we had, I think I previously testified, that

(Testimony of Jacob A. Stadtfeld.)

when we got our pipe, our structure approved altogether into the finished Metalbestos we found that we had a cost—I will take three inches, as an example, that I remember clearly, the cost was 23 cents, and we had to sell it for 18 to meet competition, and for that reason we were not able to go very far. We could not sell it to the trade at even a very small profit.

Mr. Owen: Your Honor please, in Mr. Dutton's cross-examination yesterday Mr. Connor asked him if he had the invoices that covered all the jobs, and he has produced here three invoices dated December 30, 1933, the first one is for the amount of \$327.79, the second is \$597.58, the third \$941.93, totaling \$1867.30. It is stipulated between counsel that if Mr. Dutton were recalled as a witness, in order to save time, that he would testify that these were the invoices to which he referred.

Mr. Connor: And that upon the receipt of these based his decision to discontinue the business at this date.

Mr. Owen: December 30th.

Mr. Connor: Yes. I will offer those in evidence.

(The documents were marked "Defendant's Exhibit 28.")

Q. When did Mr. Dutton first notify you, Mr. Stadtfeld, that he did not want to go ahead with the manufacture and sale of this vent pipe?

(Testimony of Jacob A. Stadtfeld.)

A. Well, it was shortly before I went down to see Mr. Payne, within two or three weeks, in Los Angeles.

Q. Do you recall when you went down to see Mr. Payne?

A. Well, it was—I would like to correct myself there. I forget whether I saw Mr. Payne in San Francisco—I did go down there, I know I [466] did go down, but whether I told him up here or went down and told him, I could not swear to that.

Q. That was a short time prior to making final arrangements to enter his employ? A. Yes.

Q. Sometime, say, between January and April of 1934?

A. Yes, I would say around there; the first of 1934.

Q. Or prior to your letter of February 28th?

A. I know I started with Mr. Payne on April 1st.

Q. Was it prior to February 28, 1934?

A. No, it was not.

Q. You were in Los Angeles, I mean, when you were down there.

A. I was. Yes, I was in Los Angeles—no, I don't think I was in Los Angeles prior to this. I think it was all done by correspondence until the time that I went down there on April 1st.

Q. That is between February 28, 1934 and April 1, 1934? A. Yes.

(Testimony of Jacob A. Stadtfeld.)

Q. You have testified that you negotiated, both you and Mr. Dutton have testified regarding your negotiations with the defendant, Mr. Payne, regarding Payne's taking over the material on hand and owned by Mr. Dutton, and that Payne did not take from Mr. Dutton all the materials he agreed to. Will you read the letter of February 28, 1934, and then tell the Court what materials Mr. Payne agreed to take that he did not?

A. I did not say, Mr. Connor, that Payne had agreed to take—I said it was explained to Mr. Payne that Mr. Dutton had full right and title in the matter and that if he wanted to take over Mr. Dutton's right that he would have to take the entire stock off his hands, but there was no agreement on Mr. Payne's part to do that.

Q. Well, are you thoroughly familiar with that letter that you have before you that you wrote?

A. Yes, I have read this over.

Q. Now, do you say that there was some other agreement expressing some condition under which you entered the employ of the Payne [467] Furnace & Supply Company, different than contained in that letter you have before you, Defendant's Exhibit 10-AW?

A. Well, I said there was no agreement with Mr. Payne, so far as the entire stock. Mr. Dutton had informed him, or I had informed him at Mr. Dutton's request that he would turn over all his

(Testimony of Jacob A. Stadtfeld.)

right in the matter, or, I told him his stock, and I would like to read this paragraph:

“Mr. Dutton will write you as soon as the stock is turned over giving you full rights to manufacture as far as he is concerned and releasing me from any obligations.”

Q. Doesn't that letter express there that if Payne will take from Mr. Dutton all of the aluminum pipe he has on hand and the fittings, and take up his obligation, itself, such fittings and made-up material as will free the San Francisco office until such time as the company down South could get under way in the manufacture, and that the balance of Mr. Dutton's stock would be disposed of to the Pittsburgh Water Heater Company?

A. That is right, but the Pittsburgh Water Heater Company did not take it.

Q. I know. That is the agreement under which you joined Mr. Payne, was it not?

A. This was before I entered Mr. Payne's employ, and on my own time I was endeavoring to clean this stock up so he would have no obligation in so far as taking any stock was concerned. If it is, I was not able to do that. In the meantime, Mr. Connor, please realize that I am not acting with any authority, as far as this stock is concerned. It was not mine.

Q. Well, Mr. Dutton has testified that he gave you full authority to negotiate and close the deal.

(Testimony of Jacob A. Stadtfeld.)

I want to know what you said to him, to Mr. Payne, regarding the arrangement, that Mr. Payne was to take over some stock, and also what other agreement is there in existence which has a bearing on the consummation of that arrangement whereby Mr. Payne started into that business, other than [468] Exhibit 10-AW, and if there is any other agreement I would like to have you point it out.

A. There is other reference to it. I cannot give you, naturally, the numbers that you refer to in court, but there are other references to that stock, and regardless, I still stand by my guns on the understanding about the disposition of the stock. It is true the Pittsburgh Water Heater Company was supposed to take whatever stock that the Payne Company were not going to take, but that did fall through, but that did not do Mr. Dutton any good. He could not be called upon to pass over his rights in the matter because some slip came in the sale; that was between the Payne Furnace & Supply Company and, you might say, myself——

Q. If there is anything in the entire transaction that you can point to I wish you would, which shows that Mr. Payne was under any obligation to dispose of any material to the Pittsburgh Water Heater Company, or any material that the Pittsburgh Water Heater Company did not take. If you can point that out I wish you would.

A. Well, your Honor, wouldn't that be for Mr. Owen to bring out? I know the evidence is here, but I don't know how to bring it out.

(Testimony of Jacob A. Stadtfeld.)

Q. I am asking you.

A. Well, I will pass that. I don't know. There is further reference to that matter, yes.

Q. You mean in your correspondence here before the Court?

A. Well, I have the lump folder here, but I wouldn't know where to find it.

Q. Can you recall to mind anything about this time that we could refer to?

A. Well, I do recall specifically a letter from Mr. Sweitzer, the purchasing agent for Payne Furnace & Supply Company, saying "We are sending an order today for the balance of the stock on hand, or for a portion of the balance of the stock on hand"—this is in regard to the Pittsburgh Water Heater letter you [469] just referred to.

Q. Well, it is a fact that during your employment by Payne that you ordered further made up materials from Mr. Dutton?

A. I was still trying to help Mr. Dutton get rid of that stock, naturally.

Q. Is there anything in your transaction, was there anything between yourself and Mr. Dutton regarding the closing of the deal that you did not disclose to Mr. Payne?

A. No. There was nothing that I could hold out. You must realize I could not take any final action in any manner, at all.

Q. Well, you were negotiating the deal, were you not, for Mr. Dutton?

(Testimony of Jacob A. Stadtfeld.)

A. I was handling it for him as best I could, yes.

Q. You were contacting Mr. Payne? A. Yes.

Q. You wrote him this letter, February 28, 1934, setting forth the understanding that you had with Mr. Payne, and the understanding that you had with Mr. Dutton, and you list in that letter certain materials that are going to be shipped to Mr. Payne out of the made-up stock, from the San Francisco office, that is all in that letter, and the Pittsburgh Water Heater Company is going to take the balance. Is there anything about the entire transaction that you did not disclose to Payne that would be binding on him in any way?

A. I cannot think of anything else, your Honor.

The Court: Well, proceed.

Mr. Connor: Q. Then your entire arrangement is in the letter of February 28, 1934, with the exception of certain purchases that you made from Mr. Dutton later in the form of voluntary purchases?

A. With this exception, it was not my arrangement.

Q. But you were acting as the representative for Mr. Dutton, or go-between between Mr. Dutton and Mr. Payne? A. Yes.

Q. You were negotiating the whole deal for the both of them. Did [470] you tell Mr. Payne at any time that you had made any assignment to Mr. Dutton, as represented in Plaintiff's Exhibit 10?

(Testimony of Jacob A. Stadtfeld.)

A. I don't know that I told Mr. Payne the exact wording of that, but in the letter I just had in my hand it is very specifically stated that when this stock is turned over Mr. Dutton will write you giving you—or freeing me from any obligation and passing over the right and title to you, meaning Mr. Payne.

Q. Isn't it a fact that the entire rights discussed were merely the question of the use of the trade name Metalbestos?

A. No. It was the invention, also.

Q. Well, what understanding did you have regarding the invention?

The Court: Well, answer.

The Witness: Well, I was waiting for some further explanation of that question, your Honor.

The Court: Read the question.

(Question read by the reporter.)

A. Well, I probably did have a little further conversation on that matter. I do not quite understand it.

Mr. Connor: Q. You stated that you had discussions relative to the trade name Metalbestos, and also regarding the invention. What discussion did you have with Mr. Payne regarding the invention, I mean the patent?

A. I thought you were talking about Mr. Dutton. Well, I told Mr. Payne when I went down—is that the time you refer to, when I went to work for Mr. Payne?

(Testimony of Jacob A. Stadtfeld.)

Q. Well, during these negotiations that you were having, that is, when you were winding up the deal.

A. I told Mr. Payne that Mr. Dutton and I had applied for, or I had, I should say, with Mr. Dutton's backing, financial backing, applied for a patent.

Q. Prior to the time you went down to Los Angeles in the early part of 1934 you had sent some samples of Metalbestos down to [471] Mr. Payne, had you not?

A. I am not sure whether I sent them down or he saw them when he was up here. I remember showing Mr. Payne some samples of Metalbestos at one time when he came up and was staying at the Hotel Whitcomb.

Q. Had you actually, prior to the time you went into Mr. Payne's employ, filed an application for a patent in connection with the Metalbestos?

A. It had not been filed. It had been drawn. I think Mr. Payne saw the copy of the application as it was drawn. In fact, I tried to get him to follow through and finance the patent to the extent of having it filed, and I suggested it.

Q. Who was your attorney?

A. That was Charles Fryer.

Q. When did you show Mr. Payne a copy of the application?

A. I think it was when I went down there and went to work for him.

(Testimony of Jacob A. Stadtfeld.)

Q. You wrote Mr. Payne a letter and sent the samples down to Mr. Payne, and Mr. Payne wrote you on November 3, 1933, and he says:

“I note samples are marked ‘Patent applied for.’ I wish you luck but don’t see how you could obtain a patent on this, as a similar vent was used in the City of Los Angeles over twenty years ago. Of course, to my knowledge the interior pipe was just galvanized or copper and never did they use aluminum. From my knowledge of insulation I don’t believe you gain anything by the two layers of 1-inch corrugated asbestos paper. Just the inner and outer pipes properly spaced with corrugated metal spacers would be just as good, or possibly better.”

Now, on November 6, 1933, you replied in part:

“As to patents, we are past the worrying stage in this connection, and while some amendments are being made, we will receive ample protection against infringement of the particular type of pipe and fittings which we are making. Out of 18 claims made we are sure of four, with the possibility of three or four ad- [472] ditional being granted. These claims do not in any manner interfere with such pipe construction as you mention in your letter, and I understand that where such pipe was made and used, only single fittings were furnished. Our fitting construction is the basis of two claims.”

At that time you had no application filed in the Patent Office?

(Testimony of Jacob A. Stadtfeld.)

A. But it was drawn, naturally——

The Court: He asked you if you had it filed.

A. No, it was not filed.

Mr. Connor: Q. You did not inform Mr. Payne of this assignment that you made to Mr. Dutton, referring to the invention or to any patent?

A. I would not say I did or did not.

The Court: You have no recollection, is that it?

A. I have no recollection.

Mr. Connor: Q. You handled certain matters after you were down there and were supervising and directing the manufacture of this Metalbestos vent pipe, and you wrote Mr. Dutton, according to the correspondence in the record, regarding further purchases. What were those purchases for?

A. For the purchase of pipe and fittings that we were not able to produce at the time, or at Payne Furnace & Supply Company. It took them some little time to get into production because they were not properly equipped. We did get that aluminum pipe from Mr. Dutton to make the outer casing, and assemble that, but in so far as certain sizes and certain fittings were concerned I remember we also had a great time getting stock of aluminum sufficient to keep it going, so it was necessary to buy from Mr. Dutton his stock from time to time.

Q. That was the made-up stock that the Pittsburgh Water Heater Company should have taken off their hands?

(Testimony of Jacob A. Stadtfeld.)

A. Yes; yes, after the [473] aluminum pipe was all drawn.

Q. As a matter of fact, you did not get your stock of aluminum until along in June or July?

A. The stock of aluminum sheet?

Q. Yes.

A. It was sometime, I don't remember just when it was.

Q. Now, plaintiff seems to be making quite a point of the fact, Mr. Stadtfeld, that you have generally been poverty stricken. You have always been pretty healthy, haven't you, able to work, I mean?

A. Yes.

Q. Was the fact that you were out of funds due in any sense to anything that Mr. Payne did, or had anything to do with?

A. I am not blaming Mr. Payne for my being poverty stricken. The fact is I was, and I did not like it, and I left Mr. Payne's employ.

Q. The point I am getting at is, did you make a point of it? I just wondered why, whether it was due to this particular arrangement.

A. It was practically due to my working on this vent pipe.

Q. All the way through, that is not particularly for Mr. Payne, but the previous employers; is that true?

A. Well, I don't know what you mean by previous employers.

(Testimony of Jacob A. Stadtfeld.)

The Court: Did the same condition that existed with Payne exist with the preceding period with the other employers?

Mr. Connor: Standard Asbestos and Plant?

A. Not *with* I was with the Plant Rubber Company.

Q. Well, about the same condition of salary, etc., existed for that job after you came up with the plaintiff in this case, didn't it, as with Payne?

A. No, it did not. By that time I had other means of income that made it very much more comfortable for me to get along.

Q. You moved your family from Los Angeles up to San Francisco sev- [474] eral months before you left down there, yourself, didn't you? A. Yes.

Q. It is a fact that you did not give Payne much notice when you left, did you?

A. That is true.

Q. I show you a letter dated September 29, 1934, and ask you if you can identify that. A. Yes.

Mr. Connor: I offer this letter in evidence as Defendant's Exhibit 29.

Mr. Owen: I object, your Honor, to the introduction of this letter, because I don't think it is material. It has not anything in it about the patent in suit. It is simply a question of some of his goods that are stored in their warehouse and he wants to get possession of them.

Mr. Connor: It has to do with the termination of employment.

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: I don't see that it has anything to do with that. He admits he left there. This letter has not a single thing in it about the patent. I object upon that ground.

Mr. Connor: It relates to the termination of employment.

The Court: Let me see it. I will allow it to remain in. It will be marked Defendant's Exhibit 29.

(The document was marked "Defendant's Exhibit 29.")

The Court: Proceed.

Mr. Connor: Q. Do you know of any installation made while you and Mr. Dutton were handling and selling, manufacturing and selling this vent pipe where the trade name "Metalbestos" was used on the pipe?

A. I would not name the location of any job off-hand. I know there was one out on McAllister street near Divisadero. There was another one on Fourteenth street, near some alley off Market. I don't know the name of it. I could find them, I could point them out to you if I were called upon to do that.

[475]

Q. In what manner was the name put on?

A. With a little paper sticker.

Q. Printed?

A. Typewritten. Mr. Dutton was in error saying they were printed. They were typed, I typed them, myself.

(Testimony of Jacob A. Stadtfeld.)

Q. Did you put the full marking on this pipe?

A. That is all we did, we did not want to spend any more money than we had to to mark the pipe.

Q. I show you Defendant's Exhibit BM, which is a copy of a letter to Mr. Dutton, which you have previously identified as having accompanied your letter of April 9, 1934, Defendant's Exhibit BM, also. Is the pipe and fittings referred to in that letter the pipe and fittings taken by the Payne Company for its San Francisco branch out of Mr. Dutton's stock?

A. Yes, I remember this letter.

Q. That was that part of the original arrangement that it should be taken up here, that part which the Pittsburgh Water Heater Company did not take, is that it?

A. Well, I don't know that this was that part that they did not take.

Q. Well, it was the San Francisco Office taking over the Pittsburgh Water Heater Company's balance?

A. Yes, if they could possibly do it. "The above quantity shall not total over \$500." Mr. Dutton had evidently written Payne Furnace & Supply Company that he wanted them to take \$500 worth of this, that he was cutting it down, and if they had taken \$500 worth he would do something or other. I would assume that from that letter, but I am not in a position to say what it is.

Q. That was the amount that he owed Williams-Wallace, is that?

A. He owed Williams-Wallace for the initial pipe fittings they made for him.

Q. Referring to the patents which you have previously testified [476] regarding, first the patent to Aldrich.

A. What is that number?

Q. That is No. 340,691. A. Yes.

Q. Now, you see in that patent, do you not, an inner pipe, A, and an outer pipe consisting of the members B, F, G insulation; outer casing pipe forming another tube, the outer tube consisting of different concentric metal tubes with insulation between, being spaced from the inner pipe A by the rivets there. Considering those two as pipes, one being a composite pipe, the other being straight pipe, is it not a fact, so far as that reference is concerned, that the outer pipe is slidable on the inner pipe?

A. Yes, but pipe A is not included in the patent. Pipe A is merely a pipe——

Q. Well, we are not concerned with what the invention is, Mr. Stadtfeld. We are only concerned with just the disclosures, irrespective of whether the inner pipe is a part of the invention or not.

A. That pipe covering might slide to the point of where the coupling on the steam pipe is covered.

Q. In so far as its structure is concerned, we are

(Testimony of Jacob A. Stadtfeld.)

only considering structure from the materials of which it is made, but only the structural set-up; it would not be impossible to have that structure for a vent pipe, would it?

A. No, it wouldn't be impossible. You could use it if it were allowable.

Q. That is what we are considering, not the cost of the vent, or the installation cost, but the principle of construction.

Turning now to the Welch patent, No. 1,927,105. You have an outer pipe, Fig. 1, and you have an inner lining, Fig. 2, of suitable yielding or compressible heat-resisting material, preferably wool. Then an inner lining, Fig. 3, which you have previously testified would not stand up under heat. If you will refer to the part beginning with line 67, page 1 of the specification "In the [477] modified form of the invention illustrated in Fig. 3 of the drawing, each pipe section is provided with a metallic sleeve, Fig. 9, in lieu of the rubber sleeve, Fig. 3, said metallic sleeve 9 having formed therein a plurality of circumferentially-spaced, longitudinally extending folds." You do use an outer pipe 1, a metallic outer pipe 1, and metallic inner pipe 3 with an insulation between them, do you not?

A. Yes.

Q. Removing the collar 5, considering one length of pipe, you do have an inner pipe which is longitudinally slidable relative to the outer pipe, do you not?

(Testimony of Jacob A. Stadtfeld.)

A. It does not show to be slidable.

Q. Well, then, that tends to stop it?

A. As a matter of fact——

Q. Well, just considering one length of pipe.

A. Yes, but you have to make provision for connecting those pipes.

Q. Just consider one length of pipe in so far as the question is concerned. You do have an inner pipe 3, which is longitudinally slidable as it relates to the outer pipe, outer tube 1, do you not, with asbestos between?

A. I would say a section of pipe such as this is intended to be used, it would not slide.

Q. Well, explain why?

A. Because the friction would hold those two pipes in permanent place.

Q. Well, I don't want to argue the point with you——

A. No, but in any insertion in the form——

Q. Well, you have the yielding, the internal ribs, 10, Fig. 3, which permit expansion of water or other liquid in the pipe 3; therefore, that inner pipe is comparatively loosely mounted in your asbestos, is it not? You can see that, can't you?

A. No, I cannot see that. I can see where the ribs are. The ribs are run into asbestos where most certainly each rib ends——

The Court: Is this the last witness?

Mr. Connor: Yes.

(Testimony of Jacob A. Stadtfeld.)

The Court: It is nearly four o'clock. [478]

Mr. Connor: Q. I don't want to argue the point with you, but it is not riveted or otherwise secured to the outer pipe——

A. (Interrupting) My opinion is it would not slide.

Q. Other than the fact you don't think it would slide, there is nothing else you find there to hold it?

A. Yes, I find the coupling where these two joints on the pipe are, where we put the coupling on. That would prevent sliding of the pipe.

Q. I am speaking of the length of pipe with the coupling off.

A. How long a length would that be?

Q. Any length. Let's not argue about it, Mr. Stadtfeld.

The Court: Proceed. He does not believe it would slide.

Mr. Connor: Q. In the patent to Meade, No. 1428294, you do find there two concentric tubes longitudinally slidable relative to each other with asbestos packing between, do you not?

A. Yes.

Q. The Hammill patent, No. 311,750, you say in that instance that there is nothing telescopically relative to your inner pipe and your outer covering A5?

A. Well, the patent covers a form of steam pipe insulation or covering. Here, again, the steam pipe

(Testimony of Jacob A. Stadtfeld.)

A is not a part of the patent, and your inner core of this insulating member is asbestos, possibly paper, or something, and it reaches around the steam pipe to the outer shell, but nothing metallic contained in this structure.

Q. That is what your testimony is based upon, or your assumption, that the pipe A is not a part of the invention?

A. No, not entirely that. Even if it were it would not be telescopically constructed. There is nothing there, there is no construction to show that this insulation is made up in some way and then telescoped inside a piece of pipe.

Q. You do find a combination of an inner and outer pipe with insulation in between?

A. But not of metal; asbestos paper. [479]

Q. You do find the two tubes, however; they are referred to as tubes, are they not; the specification says "Suitable material."

A. All right, all right.

Q. Metal would be a suitable material. Now, the O'Toole patent, No. 878,014, in giving your testimony regarding the rivets shown in Fig. 3, did you notice the specification, starting at line 64, page 1, where it says: "For the purpose of securely connecting or joining two pipe sections together, rivets 4 may be employed as desired."

A. Yes, I noticed that.

Q. Did you understand that was optional and not necessary?

A. Yes.

(Testimony of Jacob A. Stadtfeld.)

Q. With respect to the inner tube in that case, you noticed that the outer tube has a longitudinal seam? A. Yes.

Q. Would you consider that it would be anything more than mechanical skill to put a seam on the inner tube?

A. No, but he does not provide for that. One of the features of his patent is the butting up of this inner tube is to hold this sheet of asbestos against the outer casing.

Q. But even so, if you wanted to close the edges there all you would have to do would be to put a seam on it? A. Yes.

Q. You testified the Harvey patent is somewhat similar to your patent chimney that has been used in San Francisco for the past thirty or forty years.

A. Yes, if you stood it vertically. It is supposed to be installed horizontally underground.

Q. There is an inner tube with an outer tube slidably mounted on it with an optional outer housing around it, A? A. Yes.

Q. In Savage you do find that there is an outer tube with an inner tube with insulating packing between them? A. Yes.

Q. In the specification it provides an inner cylinder which has a greater range of expansion and contraction in order to take [480] care of the temperature. That would make the inner tube slidable, would it not?

(Testimony of Jacob A. Stadtfeld.)

A. The metal will expand and contract within a pretty slight order, so that you would not have to provide any special means of insulation to allow for that slidability. That slidability would mean possibly a quarter, not more than a quarter of an inch to the section, as it is shown here.

Q. If a tube will slide a quarter of an inch it will slide several inches?

A. No, it could not in the sense you could not pull it out in this, because you have turned out flanges, which would impinge on the housed in material between the two pipes.

Q. The inner end of one section has?

A. Yes, but that would be sufficient to eliminate that slidability as you refer to it.

Q. Now, the conclusion you have reached here in stating that these vent pipes would not be approved by the various building communities, etc., is due to the fact mainly of your connecting the pipes together in sections as you testified to heretofore, isn't it?

A. No, there are many more requisites of a satisfactory pipe, that is, as far as building inspectors are concerned, you must have leak-proof joints, it is very important to have a properly installed pipe so there won't be any fire hazard in connection with their installation and you must have something that is durable so that when it is installed in a concealed space, it won't have to be taken out for observance by inspectors from time to time.

(Testimony of Jacob A. Stadtfeld.)

Q. That would be provided for by proper materials in construction, would it not? A. Yes.

Mr. Connor: That is all.

Redirect Examination

Mr. Owen: Q. Referring to the Savage patent, Mr. Connor put a question which made it appear that that flange 2 at the upper edge [481] of the inner section appeared only on that lower section. Will you look at the specifications on line 50?

A. I understand that. I thought that he referred to the drawing. That is all you can see on this particular drawing, but it calls for a section of pipe as it is erected.

Q. Mr. Connor referred to the Meade reference as embodying the invention of the patent in suit. Have you had samples made of the Meade device?

A. Yes.

Q. Were these made under your direction?

A. Yes, they were.

Q. You have had a pair of them made?

A. Yes.

Q. Will you put those together like the patent in suit?

A. I would not know how to start. I could butt them together this way; I would not know whether—I can't even get a tight joint. I don't know what one would do when we came to this section.

Q. Would you have a leak-proof flue?

A. You could not have a leak-proof flue.

(Testimony of Jacob A. Stadtfeld.)

Mr. Owen: I offer in evidence the two samples of the Meade invention as Plaintiff's Exhibits 22-A and B, identical exhibits.

The Court: They will be received.

(The devices were marked, respectively, Plaintiff's Exhibits 22-A and 22-B.)

Mr. Owen: That is all.

Mr. Connor: That is all. [482]

Mr. Owen: That is all. That closes our rebuttal.

EL ROY L. PAYNE,

recalled for Defendant in Surrebuttal.

Mr. Connor: Q. During the negotiations carried on between yourself and Mr. Dutton that have been testified here, did you understand from all that Mr. Stadtfeld said to you that he had full authority to negotiate these matters on behalf of himself and Mr. Dutton? A. Yes.

Q. Did he ever say anything to you to the contrary? A. No.

Q. Did he ever at any time advise you that he had made any assignment of any nature, whatsoever, to Mr. Dutton? A. He did not.

Q. In speaking of the rights to be transferred on taking this material, what rights did you understand that you were talking about?

A. Just the trade name "Metalbestos".

Q. At the time you finally made that deal it was not on condition that there would be any applica-

(Testimony of El Roy L. Payne.)

tion filed *by or* anyone else, [483] was it?

A. No.

Mr. Owen: I do not mind speeding up, but I do not think these leading questions ought to go so far.

Mr. Connor: I will be more careful.

Q. When Mr. Stadtfeld first came down in the first part of April, 1934, did you show him that report that had been rendered to you by myself regarding the patentability of Metalbestos?

A. Yes.

Q. Was anything ever said after that respecting application for patent? A. No.

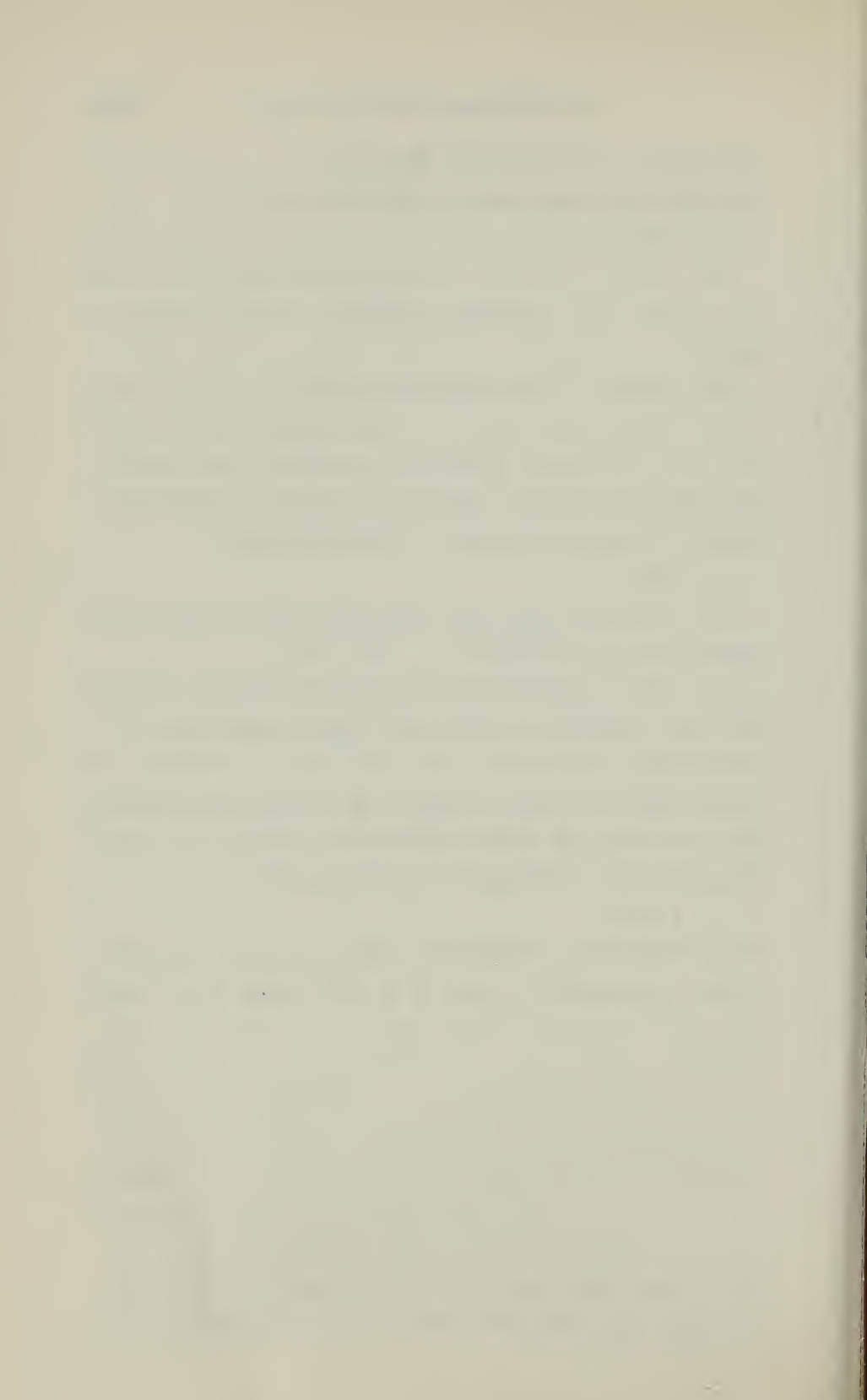
Q. That is, I mean no request was ever made by him for anything further in that connection?

A. No.

Q. Did you take, or have you always understood that you took off of Mr. Dutton everything you purchased in the confirmation of this deal?

A. I did.

Q. There is a letter in evidence here, probably almost impossible to find it in this short time, that



(Testimony of El Roy L. Payne.)

you wrote to, I believe, Mr. Trabucco, attorney for the plaintiff in this case, regarding the trademark "Metalbestos", where you stated you were going to discontinue the use of that. A. Yes.

Q. What was the reason of that?

A. The reason we wrote and told him we were going to discontinue the use of the name was because we had been using the name for a long time and advertising it to create a demand, and when the Williams Wallace Company came out and were using it, rather than go ahead and continue with the advertising under the same name and go through a lot of litigation which would probably take about a year we decided the best thing to do was to discontinue the use of the name Metalbestos and change to the name we are now using.

Q. Did you receive from Mr. Trabucco a letter regarding the registration of that trade-mark by the plaintiff? A. Yes. [484]

Q. Had you written to the plaintiff regarding your registration of the trade-mark?

A. I believe we did, Mr. Connor; we filed one, I believe—we had obtained a State right for the use of it prior to that.

Q. I show you a letter dated April 23, 1935, and ask you if that is the letter you refer to?

A. Yes, this is the one I received from Mr. Trabucco.

(Testimony of El Roy L. Payne.)

Q. Then you discussed the matter of continuing or discontinuing the trade-mark at that time with your attorneys? A. Yes.

Q. And regarding any further litigation with them, and so on?

A. Yes, we did not want to get in litigation over it, and it was shortly after that we were having the pipe approved by the Board of Fire Underwriters and rather than have them come out notifying everybody of Metalbestos being approved and the Williams Wallace Company getting the advantage of that publicity, as well as that formerly made, we decided to change the name to Payne-A-Vent.

Q. In other words, the litigation would have taken a long time and in the meantime they would be continuing to have advantage of that publicity?

A. Yes.

Mr. Connor: I offer this letter in evidence as Defendant's Exhibit 30.

The Court: It will be so received.

(The document was marked "Defendant's Exhibit 30.")

Mr. Connor: That is all.

Mr. Owen: No cross examination.

DON. D. FLEMING,

recalled for Defendant in Surrebuttal.

Mr. Connor: Q. I will show you a copy of a letter addressed by Donald D. Fleming to J. A. Stadtfeld, Beverly Hills, California, [485] to which are attached certain invoices of the Standard Asbestos Company, and I will ask you if you recall receiving and transmitting these invoices at that time?

A. Yes, I recognize them.

Q. Those are the invoices that went to your office at this time for the materials that both the San Francisco office and the Beverly Hills plant were to take off Mr. Dutton's hands through Mr. Stadtfeld?

A. That is correct.

Mr. Connor: That is all. I ask that these be marked "Defendant's Exhibit 31."

The Court: So ordered.

Mr. Connor: That is all.

Mr. Owen: That is all.

(Thereupon the case was submitted on briefs to be filed 45, 45, and 20.)

[Endorsed]: Filed May 19, 1938. [486]

[Endorsed]: No. 9327. United States Circuit Court of Appeals for the Ninth Circuit. Payne Furnace & Supply Company, Inc., a corporation, Appellant, vs. Williams-Wallace Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 9, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS.

Please substitute the firm of Lyon & Lyon, Frederick S. Lyon, Leonard S. Lyon and Reginald E. Caughey, 811 West Seventh Street, Los Angeles, California, as attorneys for defendant in the above entitled matter, in the place and stead of the undersigned, William L. Connor, 448 South Hill Street, Los Angeles, California, who hereby withdraws.

Dated at Los Angeles, California this 11th day of August, 1939.

WM. L. CONNOR

The undersigned, defendant in the above entitled matter, hereby ratifies and approves the above substitution.

Dated at Los Angeles, California, this 18th day of August, 1939.

PAYNE FURNACE & SUPPLY
COMPANY, INC.,

By E. L. PAYNE

Vice Pres.

Defendant.

The undersigned hereby accept the above substitution and appointment.

Dated at Los Angeles, California this 17th day of August, 1939.

LYON & LYON
FREDERICK S. LYON
LEONARD S. LYON
REGINALD E. CAUGHEY

The above substitution of attorneys is hereby approved and the clerk is directed to enter the same upon the record of this case.

Dated this 21st day of August, 1939.

CURTIS D. WILBUR

Senior United States Circuit
Judge.

[Endorsed]: Re-filed Oct. 9, 1939. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 9327.

PAYNE FURNACE AND SUPPLY COMPANY,
INC.,

Appellant,

vs.

WILLIAMS-WALLACE COMPANY, a corpora-
tion,

Appellee.

CONCISE STATEMENT OF POINTS UNDER
RULE 19(6) OF THIS COURT.

Notice is hereby given that at the hearing of this
appeal the appellant will rely on the following
points:

Point One.

The Stadtfeld patent 2,013,193 is invalid:

(a) because anticipated by the prior art patents
pleaded as anticipations and in evidence herein;

(b) for want of patentable invention in view of
the state of the art as exemplified by the prior pat-
ents in evidence and the prior public uses by Baker,
Shearer and Evans established by the testimony
herein;

(c) because by filing the so-called disclaimer of
February 25, 1938, appellee has disclaimed claims 1,
2 and 3 of said patent as granted by the Patent

Office, and said purported disclaimer is void in law as not within the disclaimer statutes, and the attempted disclaimer is void thereunder because in effect attempting to secure thereby a new patent for a new and different combination of elements from the combination or combinations called for by said claims 1, 2 and 3 of said patent as granted;

(d) because by said purported disclaimer appellee has attempted to assert patentable invention in the subject-matter of claims of invention made in the application for said letters patent, rejected by the Patent Office and canceled by the applicant, (for example, rejected, canceled and abandoned claim 8 presented during the prosecution of the application for said patent,) and appellee is estopped to so assert;

(e) because appellee unreasonably neglected and delayed in filing said disclaimer.

The District Court's holding predicated upon findings of fact Nos. 7 to 16, inclusive, that said patent as to claims 1, 2 and 3 with disclaimers is good and valid in law, is therefore in error and said findings are contrary to the evidence and proofs herein.

Point Two.

The District Court erred in failing to find that Jacob A. Stadtfeld did not make the invention of the patent in suit until on or about May, 1933, as shown by the correspondence between said inventor and the defendant, in evidence under the group of letters, Plaintiff's Exhibit 10.

Findings of fact Nos. 24 and 25 are therefore in error and contrary to the evidence and proofs herein.

Point Three.

The District Court erred in holding that the defendant does not have either a shopright and implied license or an express license under said patent, and in not finding, as established by the evidence and proofs herein, that Henry A. Dutton and Jacob A. Stadtfeld on September 2, 1933, entered into a contract (Plaintiff's Exhibit 10) wherein and whereby they joined in the joint enterprise of manufacturing and selling devices embodying said Stadtfeld's alleged invention purported to be subsequently covered by said Stadtfeld patent 2,013,193; that thereafter said Henry A. Dutton abandoned any right he might have asserted to the alleged Stadtfeld invention by abandoning the said joint enterprise and the manufacture of devices embodying the said invention and released and acquitted said Stadtfeld from any obligation under said Plaintiff's Exhibit 10 agreement; that with said Dutton's knowledge, consent, instigation, and subsequent ratification, said Stadtfeld entered into an agreement with defendant to employ Stadtfeld and to enter upon the business of manufacturing and selling said invention; that pursuant to said agreement with said Stadtfeld, defendant did enter upon and continue in the business of manufacturing and selling devices embodying the said invention and

did invest material sums of money in said enterprise, and performed all of the terms of its agreement with said Stadtfeld fully, and paid all moneys due thereunder to said Stadtfeld so long as said Stadtfeld remained in defendant's employ; that said Stadtfeld breached said agreement by abandoning employment with defendant and leaving defendant's employ substantially without notice, and without any default of defendant; that appellee, as the successor-in-interest of said Stadtfeld and of said Dutton, is bound by said agreement so made by said Stadtfeld with defendant, and prior to acquiring any right, title, or interest in said alleged Stadtfeld invention or patent had full knowledge and notice of said agreement and of defendant's said rights, and defendant is entitled to the full performance of its agreement with said Stadtfeld. That therefore defendant possesses the continuing right to manufacture and sell devices embodying said invention, and such manufacture and sale thereof by defendant is not in infringement of said patent or any rights of appellee thereunder.

Findings of fact Nos. 29-36, 38-49, 51, 54, and 55, upon which the District Court's said holding is predicated, are therefore in error and contrary to the evidence and proofs herein.

Point Four.

The District Court erred in failing to hold that the defendant had the right to use and to sell to

others devices embodying the invention of the patent in suit without liability therefor, pursuant to the provisions of 35 USCA, Section 48.

Point Five.

The District Court erred in holding the patent in suit valid as to claims 1, 2 and 3, and in failing to dismiss the bill of complaint. Infringement was admitted if the patent was valid.

Wherefore, appellant prays that said Decree be reversed, with directions to the court below to dismiss the bill as to appellant, with its costs.

LYON & LYON

FREDERICK S. LYON

REGINALD E. CAUGHEY

Attorneys for Appellant.

[Endorsed]: Filed Oct. 10, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION ON APPEAL UNDER RULE
19(6) OF THIS COURT

Appellant hereby designates the parts of the Record which it thinks necessary for the consideration of the appeal, said parts to be printed from the record, proceedings and evidence contained in the original certified record transmitted by the Clerk of the United States District Court for the Northern District of California, Southern Division, pursuant to the Stipulation and Order entered October, 1939.

1. Bill of Complaint.
2. Plaintiff's Interrogatories 1, 2, 3, 4, 5(b), 6(b), 7(b), 8(b), and 9(b). (Omitting order thereon.)
3. Defendant's Answers to Interrogatories 1, 2, 3, 4, 5(b), 6(b), 7(b), 8(b), and 9(b), with Exhibits thereto.
4. Interrogatories propounded to Plaintiff, (Omitting order thereon), and include Exhibits attached to said Interrogatories.
5. Plaintiff's Answer to Defendant's Interrogatories 1, and 7 to 13, inclusive, with Exhibits thereto.
6. Supplemental Bill of Complaint.
7. Supplemental Interrogatories propounded to Plaintiff (omitting Interrogatories 20 to 37, inclusive).
8. First Amended Answer and Counterclaim (omitting Paragraph 21 of said Answer, all of the Counterclaim, and Paragraphs 2, 3 and 4 of prayer.
9. Stipulation Amending Bill of Complaint to correct name of original corporate defendant.
10. Stipulation amending Answer to correct name of original corporate defendant.
11. Stipulation re Answer of Defendant, Payne Furnace and Supply Company, Inc.
12. Plaintiff's Answers to Defendant's Interrogatories 2 to 6, inclusive.
13. Plaintiff's Answers to Defendant's Interrogatories 14 to 19, inclusive.
14. Order for Decree.
15. Findings of Fact and Conclusions of Law.
16. Interlocutory Decree.

17. Notice of Appeal.
18. Cost Bond on Appeal.
19. Order Extending Time to Docket Appeal to October 1, 1939.
20. Substitution of Attorneys and Order Thereon.
21. Stipulation and Order extending time to docket appeal to October 10, 1939.
22. Stipulation and Order for transmittal of record, proceedings and evidence.
23. The following designated Plaintiff's Exhibits (or portions thereof) to be contained in Book of Exhibits:
 - 1.
 - 1-A.
 - 5 to 12, inclusive.
 - 13-A.
 - 13-B.
 - 14-A to 14-F, inclusive.
 - 15, 16, 17.
 - 18 (reduced photostat thereof).
 - 19-B, 20-B, 21.
24. The following designated Defendant's Exhibits (or portions thereof) to be contained in Book of Exhibits:
 - 2-A, 2-B, 3.
 - 4-A to 4-G, inclusive.
 - 5-A to 5-K, inclusive.
 - 6-A to 6-E, inclusive.
 - 10-A (omitting the paragraphs on page 2 beginning with "The necessary" and ending with

“and contraction”. Also omit first complete paragraph on page 3, and all of that portion following the signature.

10-B.

10-C (omitting the following portions thereof): Page 1, commencing with second paragraph, and all the balance of page 1. All of page 2. Omit that portion of page 3 to and including the words “the start”. Page 3, omit paragraph commencing with “I have”, and ending with “are wonderful”.

10-D.

10-E (omit post-script).

10-J.

10-L (omit last two paragraphs).

10-M (omit first four paragraphs).

10-O (omit paragraphs 1, 2, 4 and 5).

10-R.

10-S (omit third paragraph of page 1. Omit that portion of pages 2 and 3 beginning with “I have” on page 2, and ending on page 3 with “to date”).

10-V, 10-W, 10-Z, 10-AA, 10-AE, 10-AF, 10-AG, 10-AH, 10-AI, 10-AJ, 10-AK, 10-AL, 10-AM, 10-AN, 10-AO, 10-AP, 10-AQ, 10-AR, 10-AS, 10-AT, 10-AU (together with comparative heat tests attached thereto), 10-AV, 10-AW, 10-AX, 10-AY, 10-AZ.

10-BD, 10-BE, 10-BG, 10-BJ.

10-BN (omit first two pages, and include only the interdepartmental correspondence dated

4/9/34). The portion of this Exhibit to be printed should be printed with Plaintiff's Exhibit 14-B.

10-BW, 10-BX.

11, 12.

14-A to 14-G, inclusive.

15-A to 15-J, inclusive.

16, 17, 18, 20, 21, 24, 26, 27, 28, 29, 30, 31.

Exhibits A to F, inclusive, to Defendant's Depositions, (which depositions are in evidence as Defts. Exhibit 1).

25. The original Reporter's Transcript of the evidence and proceedings at the trial, transmitted to this Court,—with the following omissions:

Page 1, (except date).

Page 2, lines 1-10, and last line.

Pages 3 to 6, inclusive.

Page 7, all except last sentence, commencing "in the preparation", etc.

Page 8, line 1, and portion of line 2 ending with "disclaimer".

Pages 9 to 12, inclusive.

Page 13, lines 1-15; 29-31.

Page 14, lines 1-22.

Page 15, lines 8-19. Line 25, include the following: "Mr. Owen: Plaintiff rests, your Honor.", and omit balance of page.

Pages 16 to 19, inclusive.

Page 20, lines 1-9.

Page 23, line 11, to end of page.

Page 24, lines 1-7.

Page 25, lines 25-30.

Page 26, lines 1-9; 22-30.

Page 27.

Pages 30 to 32, inclusive.

Page 37, line 15, to end of page.

Page 38, lines 1-28. (Last 3 lines of page included.)

Page 39, lines 6-30.

Page 40, lines 1-28. (Last 3 lines included.)

Page 41, lines 5-31 (i.e., to end of page).

Page 42, lines 1-9; 27-30 (i.e., last 4 lines).

Page 43, lines 1-19; 27-30 (i.e., last 4 lines).

Page 44, lines 1-9; line 22 to end of page.

Page 45, lines 1-2.

Page 48, last two lines.

Page 49, lines 1-24.

Page 50, lines 5-12, 18-30.

Page 51, lines 1-11, and last five lines.

Page 52, lines 1-24, ending with "tification."

Page 53, lines 1-18.

Page 60, lines 11-21, and last three lines.

Page 61, lines 1-21.

Page 69, lines 26-31 (i.e., to end of page).

Pages 70, and 71, and 72.

Page 73, lines 1-6.

Page 74, line 23 to end of page.

Page 75, lines 1-2.

Page 76, lines 4-5, and 11 to end of page.

Page 77, lines 1-7.

Page 93, lines 25-30.

Page 94, lines 1-15; 22 to end of page.

Page 95, lines 1-23.

Page 97, line 8 to end of page.

Page 98, lines 1-2.

(Omit index preceding page 108.)

Page 139, lines 20-27.

(Omit index preceding page 143.)

Page 158, line 11 to end of page.

Page 159, lines 1-14.

Page 163, last 6 lines.

Page 164, lines 1-24.

Page 170, lines 10 to end of page.

Page 171, lines 1-6.

Page 219, line 17 to end of page.

Page 220.

Page 220 $\frac{1}{2}$.

(Omit index preceding page 265.)

Page 280, lines 6-8.

Page 301, lines 26-29.

Page 308, lines 11-17.

Page 314, lines 27-31.

Page 315, lines 1-20. Also "Yes." on line 21.

Page 343, lines 26-31.

Page 344, lines 1-13.

26. Defendant's Depositions (Defts. Ex. 1), with following omissions:

Page 1, lines 1-13; 19-25.

Page 2, lines 1-21.

Page 10, lines 10-26.

Page 11, lines 1-22.

Page 13, lines 24-26.

Page 14, lines 1-11; 18-23.

Page 15, lines 3-26.

Pages 16 to 19, inclusive.

Page 20, lines 1-8.

27. Physical exhibits, designated as such in the Stipulation and Order for transmission of the records, proceedings and evidence, and now in the possession of the Clerk of this Court.

28. Concise Statement of Points Under Rule 19(6) of this Court.

29. This Designation on Appeal Under Rule 19(6) of this Court.

LYON & LYON

FREDERICK L. LYON

REGINALD E. CAUGHEY

Attorneys for Appellant

[Endorsed]: Filed Oct. 10, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR CHANGES IN APPELLANT'S DESIGNATION ON APPEAL

It is hereby stipulated and agreed between counsel for the appellant and appellee that the following changes be made in the Designation on Appeal Under Rule 19(6) of This Court filed here on October 11, 1939.

1. Amend item 2, page 1, line 23, to read, "Plaintiff's Interrogatories 1, 2, 3 and 4. (Omitting order thereon.)"

2. In item 3, please amend to read, "Defendant's Answers to Interrogatories 1, 2, 3 and 4."

3. On page 3, lines 16 to 20, change to read, "10-C (omitting the following portions thereof): The paragraphs on page 2 which begin, 'I feel that' and 'El Roy, I'm just * * *', and on page 3, the paragraph which begins 'I can easily * * *'".

4. On page 3, line 22, change "10-E" to read "(omit postscript except last three sentences beginning 'It will be')".

5. On page 4, line 26, after "Page 8" insert—except—.

6. On page 5, line 8, after "Pages 30" insert—(except lines 1 to 3)—.

7. On page 5, line 12, change "28" to —27—.

8. On page 5, line 19, change "24" to—25—.

9. On page 5, line 20, change "18" to—19—.

10. On page 5, line 26, change "26" to—28—.

11. On page 5, line 27, change "Pages" to —Page—, replace the comma after 70 with a period and strike out "and 71, and 72."

12. On page 5, line 28, strike out the line which reads "Page 73, lines 1-6", and insert instead, —Page 71, except line 3 "Mr. Owen" and lines 4 and 5 to read "There is a letter * * *"—; and except line 16 "Mr. Connor" and lines 22 beginning "There is absolutely * * *" to the end of the page.

13. On page 5, lines 31 and 32, strike out the references to pages 76 and 77.

14. On page 6, line 7, change "20" to—22—.

15. On page 6, line 12, change this to read—Page 164—.

16. On page 6, between lines 12 and 13, insert —Page 165, lines 1 to 5—.

17. On page 6, line 15, strike out the line which reads "Page 219, line 17 to end of page".

18. On page 6, line 16, change to read, —Page 220, line 15 to end of page—.

19. On page 6, line 19, change to read, —Page 280, lines 4 to 8 beginning with "A. I do not * * *"—.

20. On page 6, lines 22 and 23, strike out completely all reference to Page 314 and Page 315.

It is also agreed between counsel that when Exhibit 10-BD is produced in the record, the printer shall place a reference character behind the date 3-7-34 occurring in the first sentence of the second paragraph of this letter, and, as a footnote, the following legend: "This letter was not introduced in evidence".

LYON & LYON

FREDERICK S. LYON

REGINALD E. CAUGHEY

Attorneys for Appellant

Dated: October 20th, 1939.

A. DONHAM OWEN

Attorney for Appellee.

Dated: October 20th, 1939.

[Endorsed]: Filed Oct. 20, 1939. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION SPECIFYING PORTIONS TO
BE PRINTED OF EXHIBITS HERETO-
FORE DESIGNATED BY APPELLANT
AND DELETING CERTAIN OF SAID EX-
HIBITS.

It is hereby stipulated and agreed between counsel for the Appellant and Appellee that with respect to the Exhibits enumerated herein, previously designated by Appellant, only the following portions shall be printed:

Plaintiff-Appellee's Exhibits

1. Exhibit 5—all of said Exhibit except pages 3 and 4.
2. Exhibit 7—portion blocked out in red pencil on Exhibit.
3. Exhibit 9—portion blocked out in red pencil on Exhibit.
4. Exhibit 12—portion corresponding to soft copy of trademark obtained from Patent Office, constituting interior page of Exhibit.

Defendant-Appellant's Exhibits

5. Exhibit 3—include only pages 5, 6, and 9 to 19, inclusive. (Numbered in pencil).
6. Exhibit 8—on first page only heading "Gas Water Heaters", words "Section 82", and last paragraph beginning "It shall be unlawful"; all of

page 2; first four lines of page 3; closing paragraph on page 4; signature of Clerk and Mayor, and date of approval.

7. Exhibit 9—only pages 1 and 2; paragraphs 4 and 7 on page 3; and last paragraph on page 4 with signatures and date of approval.

8. Exhibit 12—only letter, omitting patents attached thereto.

9. Exhibit 14-A—only page 45 of Western Gas for June 1934 and portion blocked out in red pencil on page 48.

10. Exhibit 14-B—portion blocked out in red pencil on Exhibit.

11. Exhibit 14-D—portion blocked out in red pencil on Exhibit.

12. Exhibit 15-B—portion blocked out in red pencil on Exhibit.

13. Exhibit 16—only pages 1 and 2; place an asterisk at the bottom of page 1 stating: "8000 bulletins printed at cost of \$177.25."

14. Exhibit 18—only first and fifth of letters constituting group.

15. Exhibit 21—only first page of invoices showing total amount of purchases; place an asterisk at bottom of page stating: "This statement covers purchases of aluminum sheets."; omit remainder of Exhibit showing purchases in detail.

16. Exhibit 24—only page 1 and portion on page 3 blocked out in red pencil.

It is further stipulated that the printing of the following Exhibits, previously designated by Appellant, may be omitted:

A. Plaintiff-Appellee's Exhibit 1-A. Exhibit 1-A, a disclaimer, will be attached to the soft copies of Plaintiff-Appellee's Exhibit 1 obtained from the Patent Office.

B. Defendant-Appellant's Exhibit 14-C. The pertinent portion of this Exhibit is the same as Exhibit 14-A.

C. Defendant-Appellant's Exhibits 14-E, 14-F and 14-G. The pertinent portions of these Exhibits are the same as Exhibit 14-D.

D. Defendant-Appellant's Exhibit 15-A. The pertinent portion of this Exhibit is the same as Exhibit 14-A.

E. Defendant-Appellant's Exhibits 15-C to 15-J, inclusive. The pertinent portions of these Exhibits are the same as Exhibit 15-B.

F. Defendant-Appellant's Exhibit 26.

It is further stipulated that the foregoing items A to E, inclusive, shall be listed in the index with appropriate notations why they are not reproduced, as stated in said items.

It is further stipulated, in reproducing the Exhibits, it is not necessary that each of said Exhibits shall appear on a separate page but that two or more of said Exhibits may be grouped on a single page with notations thereon identifying said Exhibits; for example, the portions of Defendant-

Appellant's Exhibits 14-B, 14-D and 15-B, can readily be grouped on a single page.

LYON & LYON

FREDERICK S. LYON

REGINALD E. CAUGHEY

Attorneys for Appellant

Dated Oct. 25, 1939.

A. DONHAM OWEN

Attorney for Appellee

Dated October 26, 1939.

[Endorsed]: Filed Oct. 30, 1939. Paul P. O'Brien,
Clerk.

THE UNIVERSITY OF CHICAGO

PHILOSOPHY DEPARTMENT

PHILOSOPHY 101

LECTURE NOTES

BY [Name]

DATE

TOPIC

1. Introduction

2. The Philosophy of Language

3. The Philosophy of Mind

4. The Philosophy of Action

5. The Philosophy of Law

6. The Philosophy of Politics

7. The Philosophy of Religion

8. The Philosophy of Science